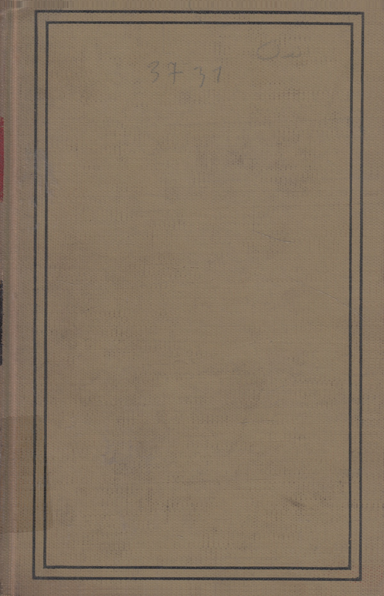






CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

DECEMBER 5, 1938 TO APRIL 17, 1939

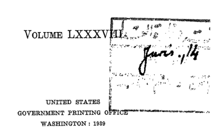
WITH

ABSTRACT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

JAMES A. HOYT

VOLUME LXXXVIII



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Chief Justice

Fenton W. Booth

Judges

William R. Green

Benjamin H. Littleton

Thomas S. Williams

Richard S. Whaley

Auditor

James A. Hoyt

Secretary

Walter H. Moling

Chief Clerk

Willard L. Hart

Assistant Clerk

Fred C. Kleinschmidt

Bailiff

Jerry J. Marcotte

Assistant Attorneys General

(Charged with the defense of the Government)

Sam E. Whitaker

James W. Morris

Carl McFarland



COMMISSIONERS OF THE COURT

ISRAEL M. FOSTER.

HAYNER H. GORDON.

EWART W. HOBBS.

RICHARD H. AKERS.

C. WILLIAM RAMSEYER.

MELVILLE D. CHURCH.



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AMENDMENTS TO RULES

ORDER OF THE COURT AMENDING RULE 39

It is ordered this 1st day of May, 1939, that RULE 39 of the Rules of the Court of Claims be and the same is amended by adding thereto Rule "39 (a)" as follows:

"39 (a). In every Indian case, unless otherwise ordered by the court or stipulated by the parties, the hearing in the first instance shall be limited to the issues of fact and law relating to the right of the plaintiff to recover, and the court shall enter its judgment adjudicating that right. If the court holds in favor of the plaintiff, the judgment shall be in the form of an interlocutory order, reserving the determination of the amount of the recovery and the amount of offsets, if any, for further proceedings. After the entry of such an interlocutory order, either party may move for a new trial under the provisions of Rules 91 to 97, inclusive."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

AMENDED COPYRIGHT RULE 1

Rule 1 of the Copyright Rules heretofore promulgated by this Court (214 U. S., Appendix) is amended, effective September 1, 1939, to read as follows:

"Proceedings in actions brought under section 25 of the Act of March 4, 1909, entitled "An Act to amend and consolidate the acts respecting copyright", including proceedings relating to the perfecting of appeals, shall be governed by the Rules of Civil Procedure, in so far as they are not inconsistent with these rules."

JUNE 5, 1939.

LEGISLATION RELATING TO THE COURT OF CLAIMS

[PUBLIC—No. 81—76TH CONGRESS]
[CHAPTER 140—1ST SESSION]

[S. 198]

AN ACT

To provide that records certified by the Court of Claims to the Supreme Court, in response to writs of certiorari, may include material portions of the evidence, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3, subsection b, of the Act of February 13, 1925 (43 Stat. 936, 939, c. 229; U. S. Code, title 28, sec. 288 b), be amended so as to read as follows:

"(b) In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

Approved, May 22, 1939.

CASES DECIDED

IN

THE COURT OF CLAIMS

December 5, 1938 to April 17, 1939

CHIPPEWA INDIANS OF MINNESOTA v. THE UNITED STATES

[No. H-155. Decided November 14, 1938. Supplemental opinion January 9, 1939]

On the Proofs

Indian claims; policy of the government.—In enacting the Act of January 14, 1889, providing for the disposition of the lands held by the Chippewa Indians of Minnesota, it is held that Congress clearly intended to put into effect the Government's prevailing Indian policy, which was to secure the dissolution of the various Indian Bands and Tribes, allot to them lands in severalty, dispose of surplus lands for their benefit and otherwise seek to civilize the Indians themselves.

Same; conservation of tribal funds not the establishment of a conventional trust.—Where Congress provided, in the Act of 1889, that tribal funds accruing from the sale of surplus lands, should be conserved for the benefit of the Indians, it was not the intent of Congress to establish a trust fund, which would be beyond the control of Congress itself.

Same; division of the Chippewa Tribe into Bands.—The fact that the Chippewa Indians of Minnesota as a Tribe were divided into bands does not destroy the identity of the Tribe as such or alter the character of the title by which their lands are held.

Same; tribal funds.—Where, under the Act of 1889, there was a voluntary merger of all the tribal lands, participated in by all the Bands of the Chippewa Tribe, and consummated by cessions of all the Chippewa Bands, the funds resulting from the sale of said lands were tribal funds.

Syllabus

Same; authority of Congress over tribal funds.—The fact that Congress in the Act of 1889 did not exert to the limit the power and authority which Congress indisputably possessed over tribal funds does not sustain the contention that the plenary power of Congress over tribal funds was surrendered; the inclusion of a referendum clause in the Act did not change the established relationship of the government and the Indians; the mutual assent of the interested parties to the enactment of the Act did not create a contract.

Same.—In the enactment of statutes similar to the Act of 1889, Congress did not intend to surrender its plenary power if subsequent conditions justified further legislation, for the benefit of the Indians, provided such subsequent legislation did not take from the Indians vested rights.

Same.—There is held to be no foundation for the contention that under an Act of Congress providing for the settlement of Indian tribal estates a succeeding Congress is powerless to alter a former Act, when the succeeding Congress deems it essential to exercise its plenary power over tribal funds for the good of the tribe.

Indian tribal funds: reimbursement for appropriations.—It is held that the policy of Congress in providing that expenditures made by the Government for the benefit of the Indians, including education and drainage, should be reimbursed from tribal funds is an exercise of the discretion and authority of Congress in which the courts may not intervene.

Tribal affairs; administration by the Government.—It is held that the Act of 1889 did not accomplish an "immediate emancipation" of the plaintiff Indians; that the Act did not dissolve the relationship of guardian and ward; and that it did not place the Government in the position of being absolutely unable to administer their tribal affairs.

Authority of Congress.—If Congress determined to utilize the existing fund for a generation of tribal Indians who in their judgment needed it to ward off the hardships of life, and who were really the creators of the fund, it was a matter for Congress to determine and not the courts.

Same.—Congress possesses the exclusive and plenary authority to deal with tribal Indian lands and funds as in its wisdom it deems just; this is a matter within the exclusive jurisdiction of Congress and if the legislation does not impair vested rights or appropriate property for a public purpose the courts are absolutely without jurisdiction.

Jurisdictional Act.—The jurisdictional Act does not create rights and consequent liabilities; nor does it by its terms recognize existing rights under the Act of 1889. *Mille Lac Band of Chippewa Indians* v. *The United States* (229 U. S. 498, 520) cited.

Reporter's Statement of the Case

The Reporter's statement of the case:

Mr. Donald S. Holmes for the plaintiffs. *Mr. Webster Ballinger* and *Holmes, Mayall, Reavill & Neimeyer* were on the briefs.

Messrs. Raymond T. Nagle and *Walter C. Shoup*, with whom was *Mr. Assistant Attorney General Carl McFarland*, for the defendant. *Mr. George T. Stormont* was on the brief.

The court made special findings of fact as follows:

1. This suit is brought under a special jurisdictional act approved May 14, 1926 (44 Stat. 555), as amended by acts of April 11, 1928 (45 Stat. 423), and June 18, 1934 (48 Stat. 979), which act as so amended provides in part as follows:

> SEC. 1. That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party as in other cases, notwithstanding the lapse of time or statute of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of the Act of January 14, 1889 (25 Stat. L. 642), or arising under or growing out of any subsequent Act of Congress in relation to Indian Affairs which said Chippewa Indians of Minnesota may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States. In any such suit or suits the plaintiffs, the Chippewa Indians of Minnesota, shall be considered as including and representing all those entitled to share in the final distribution of the permanent fund provided for by Section 7 of the Act of January 14, 1889 (25 Stat. L. 642), and the agreements entered into thereunder: *Provided*, That nothing herein shall be construed to affect the powers of the Secretary of the Interior to determine the roll or rolls of the Chippewa Indians of Minnesota for the purpose of making any distribution of the permanent Chippewa fund or of the interest accruing thereon or of the proceeds of any judgments: *Provided further*, That nothing herein shall be construed to authorize the submission to the Court of Claims for determination of any individual claim or claims to enrollment with the Chippewa Indians of Minnesota or to share in the interest or principal of the per-

manent Chippewa fund or in any funds hereafter acquired: *Provided further*, That the qualifications necessary to such enrollment shall not be changed or affected in any manner by the provisions of this Act.

SEC. 3. In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the said Chippewa Indians, and any payment or payments which may have been made by the United States upon any claim against the United States by said Indians shall not operate as an estoppel, but may be pleaded as an offset in such suit or suits as may gratuities, if any, paid to or expended for said Indians subsequent to January 14, 1889.

SEC. 4. If it be determined by the court that the United States, in violation of the terms and provisions of any law, treaty, or agreement as provided in Section 1 hereof, has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal, together with interest thereon, at 5 per centum per annum from the date thereof; and with reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Chippewa Indians in and to such money or other property.

2. Plaintiffs, the Chippewa Indians of Minnesota, who constitute the class designated and described in the Act of January 14, 1889 (25 Stat. 642), as "all of the Chippewa Indians of Minnesota," and the class authorized by the acts aforesaid to maintain suits as therein provided, filed their petition in this court on April 13, 1927, and defendant filed its general traverse thereto on May 23, 1927. Thereafter on August 18, 1930, pursuant to leave granted by order of this court of that date, plaintiffs duly filed their amended petition. On September 27, 1930, defendant filed its general traverse to the amended petition. On August 22, 1935, plaintiffs by leave of court filed their second amended petition and on October 1, 1935, defendant filed its general traverse thereto.

3. On and long prior to the approval of the Act of Congress of January 14, 1889 (*supra*), the various bands or

tribes of Chippewa Indians in Minnesota resided on twelve reservations in that State as to which the Indian title had not been extinguished.

4. The act of January 14, 1889 (*supra*), entitled "An Act for the Relief and Civilization of the Chippewa Indians in Minnesota," is in words and figures as follows:

An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States is hereby authorized and directed, within sixty days after the passage of this act, to designate and appoint three Commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated; and such session and relinquishment shall be deemed sufficient as to each of said several reservations, except as to the Red Lake Reservation, if made and assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations; and as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all the Chippewa Indians in Minnesota; and provided that all agreements therefor shall be approved by the President of the United States before taking effect: *Provided further*, That in any case where an allotment in severalty has heretofore been made to any Indian of land upon any of said reservations, he shall not be deprived thereof or disturbed therein except by his own individual consent separately and previously given, in such form and manner as may be prescribed by the

Secretary of the Interior. And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, and for the purpose of making the allotments and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults, and male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact numbers of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the Interior, and the other with the official head of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

SEC. 2. That the said commissioners shall, before entering upon the discharge of their duties, each give a bond to the United States in the sum of ten thousand dollars, with sufficient sureties, to be approved by the Secretary of the Interior, and conditioned for the faithful discharge of their duties under this act, and they shall also each take an oath to support the Constitution of the United States and to faithfully discharge the duties of their office, which bonds and oaths shall be filed with the Secretary of the Interior. Said commissioners shall be entitled to a compensation of ten dollars per day for each day actually employed in the discharge of their duties, and for their actual traveling expenses and board, not exceeding three dollars per day. Said commissioners shall also be authorized to employ a competent interpreter while engaged in the performance of their duties, at a compensation and allowance to be fixed by them, not in excess of that allowed to each of them under this act.

SEC. 3. That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Res-

ervation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: *Provided, however*, That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: *Provided further*, That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

SEC. 4. That as soon as the cession and relinquishment of said Indian title has been obtained and approved as aforesaid, it shall be the duty of the Commissioners of the General Land Office to cause the lands so ceded to the United States to be surveyed in the manner provided by law for the survey of public lands, and as soon as practicable after such survey has been made, and the report, field notes, and plats thereof filed in the General Land Office, and duly approved by the Commissioner thereof, the said Secretary of the Interior, upon notice of the completion of such surveys, shall appoint a sufficient number of competent and experienced examiners, in order that the work may be done within a reasonable time, who shall go upon said lands thus surveyed and personally make a careful, complete, and thorough examination of the same by forty-acre lots, for the purpose of ascertaining on which lots or tracts there is standing or growing pine timber, which tracts on which pine timber is standing or growing for the purposes of this act shall be termed "pine lands," the minutes of such examination to be at the time entered in books provided for that purpose, showing with particularity the amount and quality of all pine timber standing or

growing on any lot or tract, the amount of such pine timber to be estimated by feet in the manner usual in estimating such timber, which estimates and reports of all such examinations shall be filed with the Commissioner of the General Land Office as a part of the permanent records thereof, and thereupon that officer shall cause to be made a list of all such pine lands, describing each forty-acre lot or tract thereof separately, and opposite each such description he shall place the actual cash value of the same, according to his best judgment and information, but such valuation shall not be at a rate of less than three dollars per thousand feet, board measure of the pine timber thereon, and thereupon such lists of lands so appraised shall be transmitted to the Secretary of the Interior for approval, modification, or rejection, as he may deem proper. If the appraisals are rejected as a whole, then the Secretary of the Interior shall substitute a new appraisal and the same or original list as approved or modified shall be filed with the Commissioner of the General Land Office as the appraisal of said lands, and as constituting the minimum price for which said lands may be sold, as hereinafter provided, but in no event shall said pine lands be appraised at a rate of less than three dollars per thousand feet board measure of the pine timber thereon. Duplicate lists of said lands as appraised, together with copies of the field-notes, surveys, and minutes of examinations, shall be filed and kept in the office of the register of the land office of the district within which said lands may be situated, and copies of said lists with the appraisals shall be furnished to any person desiring the same upon application to the Commissioner of the General Land Office or to the register of said local land office.

The compensation of the examiners so provided for in this section shall be fixed by the Secretary of the Interior, but in no event shall exceed the sum of six dollars per day for each person so employed, including all expenses.

All other lands acquired from the said Indians on said reservation other than pine lands are for the purposes of this act termed "agricultural lands."

SEC. 5. That after the survey, examination and appraisals of said pine lands has been fully completed they shall be proclaimed as in market and offered for sale in the following manner: The Commissioner of the General Land Office shall cause notices to be inserted once in each week for four successive weeks in one newspaper of general circulation published in

Minneapolis, Saint Paul, Duluth, and Crookston, Minnesota; Chicago, Illinois; Milwaukee, Wisconsin; Detroit, Michigan; Philadelphia and Williamsport, Pennsylvania; and Boston, Massachusetts, of the sale of said lands at public auction to the highest bidder for cash at the local land office of the district within which said lands are located, said notice to state the time and place and terms of such sale. At such sale said lands shall be offered in Forty-acre parcels, except in case of fractions containing either more or less than forty acres, which shall be sold entire. In no event shall any parcel be sold for a less sum than its appraised value. The residue of such lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same upon application at the local land office.

SEC. 6. That when any of the agricultural lands on said reservation not allotted under this act nor reserved for the future use of said Indians have been surveyed, the Secretary of the Interior shall give thirty days' notice through at least one newspaper published at Saint Paul and Crookston, in the State of Minnesota, and, at the expiration of thirty days, the said agricultural lands so surveyed shall be disposed of by the United States to actual settlers only under the provisions of the homestead law: *Provided*, That each settler under and in accordance with the provisions of said homestead laws shall pay to the United States for the land so taken by him the sum of one dollar and twenty-five cents for each and every acre, in five equal annual payments, and shall be entitled to a patent therefor only at the expiration of five years from the date of entry, according to said homestead laws, and after the full payment of said one dollar and twenty-five cents per acre therefor, and due proof of occupancy for said period of five years; and any conveyance of said lands so taken as a homestead, or any contract touching the same, prior to the date of final entry, shall be null and void: *Provided*, That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid, pre-emption, or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon: *Provided*, That any person who has not heretofore had the benefit of the homestead or pre-emption law, and

who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act.

SEC. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians, in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: *Provided*, that Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of

three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the first five years be expended in procuring live-stock, teams, farming implements, and seed for such of the Indians to the extent of their shares as are fit and desire to engage in farming, but as to the rest, in cash; and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess for all the advances of interest made as herein contemplated and other expenses hereunder.

SEC. 8. That the sum of one hundred and fifty thousand dollars is hereby appropriated, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, to pay for procuring the cession and relinquishment, making the census, surveys, appraisals, removal and allotments, and the first annual payment of interest herein contemplated and provided for, which money shall be expended under the direction of the Secretary of the Interior in conformity with the provisions of this act. A detailed statement of which expenses, except the interest aforesaid, shall be reported to Congress when the expenditures shall be completed.

Approved, January 14, 1889.

5. Within the time prescribed in Section 1 of the act of January 14, 1889 (*supra*), the President, as therein authorized, appointed as commissioners Hon. H. M. Rice, Rt. Rev. Martin Marty, and Joseph B. Whiting, who duly qualified and entered upon the discharge of their duties. These commissioners met with the various bands or tribes of Chippewa Indians in Minnesota, held numerous council meetings with them at their various reservations, and while negotiating with each of said bands or tribes prepared census rolls, as the act provided, and concluded agreements of cession with all the different bands or tribes, as the act provided, and for the uses and purposes therein stated. The act of January 14, 1889, was embodied in each of the agreements, either verbatim or by express reference, and each such agreement recited the act had been read, interpreted, and thoroughly

explained to the understanding of the Indians who consented and agreed to the act and accepted and ratified the same, and each agreement provided that the lands in question were ceded for the purposes and upon the terms stated in the act. The commissioners, after completing the census provided for by the act, and after the negotiation and execution of all the agreements, as aforesaid, on or about December 26, 1889, transmitted the same, together with the report of their transactions in connection therewith, through the Commissioner of Indian Affairs to the Secretary of the Interior. The Secretary of the Interior, on or about January 30, 1890, transmitted the commissioners' report and the agreements, together with his report thereon, to the President and, on March 4, 1890, the President accepted and approved the cessions and relinquishments thus effected, endorsed and signed his approval upon each of the agreements made with the several tribes or bands of Chippewa Indians of Minnesota, and on March 4, 1890, transmitted these reports and agreements to the Congress.

6. Defendant proceeded with the disposal of the ceded lands and the timber thereon and established in the Treasury of the United States a permanent fund which was designated on defendant's books of account and is hereinafter referred to as "Chippewas in Minnesota Fund," in which from time to time it covered, deposited, and credited moneys accruing from the disposal of the ceded lands and timber, and which fund is the interest-bearing "permanent fund" referred to and provided for by Section 7 of the act. Defendant further established a non-interest-bearing fund designated in defendant's books of account and hereinafter referred to as "Interest on Chippewas of Minnesota Fund," into which fund defendant covered various amounts from time to time as and for the interest accruing at the rate of 5% per annum on the amounts from time to time remaining in said permanent fund above described.

7. The first appropriation made by defendant for advance interest as provided in Section 7 of the act of January 14, 1889 (*supra*), was made by Section 8 of that act. Pursuant

to this and subsequent annual acts of Congress passed in each of the years 1891 to 1910, both inclusive, each appropriating the sum of $90,000 for "Advance Interest to Chippewas in Minnesota, Reimbursable," the defendant appropriated out of public funds a total sum of $1,890,000. During the fiscal years 1891 to 1912, inclusive, defendant expended out of public funds so appropriated for the use and benefit of the Chippewa Indians of Minnesota the total sum of $1,861,-289.28, of which sum $1,386,048.53 was disbursed in per capita cash payments to these Indians as advance interest in accordance with the act and agreements, and the balance of $475,240.75 was disbursed for education, medical attention, hardware, glass, oils and paints, boats, docks, etc., and miscellaneous agency expenses.

Thereafter and during the fiscal years 1913 to 1925, inclusive, the defendant further expended out of these appropriations in per capita cash payments to these Indians for their use and benefit further sums totaling $8,640.11, making the total amount so expended out of these appropriations during the fiscal years 1891–1925, both inclusive, $1,869,929.39.

No interest actually accrued on the principal "Chippewas in Minnesota Fund" prior to the fiscal year ending June 30, 1897, the first deposits therein having been covered on September 30, 1896, and the first credit to "Interest on Chippewas in Minnesota Fund" was for interest accrued during the fiscal years 1897 to 1904, inclusive, aggregating $334,898, which sum was covered into the interest fund on January 13, 1904, and July 1, 1904. All such interest thereafter accruing was covered into the "Interest on Chippewas in Minnesota Fund" semi-annually as the same accrued. There were no disbursements from the "Interest on Chippewas in Minnesota Fund" prior to the fiscal year ending June 30, 1911, when amounts aggregating $26,741.79 were disbursed therefrom for education.

The amounts so appropriated for advance interest and the amounts actually disbursed by defendant out of public funds as such advance interest under the appropriations aforesaid and the interest actually accruing on the "Chippewas in Min-

nesota Fund," during each fiscal year from 1891 to 1912, inclusive, are correctly shown in the following table:

Fiscal year ending June 30th	Appropriated for advance interest	Disbursed as advance interest	Interest actually accrued on Chippewa Fund
1891	$90,000.00	$73,677.24	$0.00
1892	90,000.00	79,520.65	0.00
1893	90,000.00	73,481.77	0.00
1894	90,000.00	78,543.40	0.00
1895	90,000.00	82,370.75	0.00
1896	90,000.00	80,763.59	0.00
1897	90,000.00	86,000.91	12,078.30
1898	90,000.00	14,632.78	14,068.70
1899	90,000.00	95,211.39	35,425.41
1900	90,000.00	77,711.42	39,934.90
1901	90,000.00	57,076.41	47,619.67
1902	90,000.00	52,500.25	54,775.93
1903	90,000.00	55,439.75	57,913.80
1904	90,000.00	92,194.71	73,081.49
1905	90,000.00	100,865.04	116,116.35
1906	90,000.00	154,051.36	159,041.05
1907	90,000.00	181,655.46	216,242.25
1908	90,000.00	160,427.73	257,412.24
1909	90,000.00	85,776.31	297,963.18
1910	90,000.00	89,086.95	321,143.15
1911	90,000.00	89,082.98	345,568.34
1912	0.00	1,209.43	204,708.89
Total	$1,890,000.00	$1,861,289.28	$2,253,093.65

During the fiscal years ending June 30, 1891 to 1896, inclusive, during which no interest actually accrued on the "Chippewas in Minnesota Fund," the total disbursements by defendant as advance interest, as aforesaid, aggregated $468,357.40.

During the fiscal years ending June 30, 1897, to 1904, inclusive, during each of which years the interest actually accrued on the "Chippewas in Minnesota Fund" was less than $90,000 per year, the total disbursements by defendant as advance interest, as aforesaid, aggregated $530,776.62, and the total interest so accruing during those years aggregated $334,898.

During each of the fiscal years ending June 30, 1905, to 1912, inclusive, the interest actually accrued on the "Chippewas in Minnesota Fund" exceeded $90,000 per year and exceeded the total amount disbursed by defendant as interest and advance interest during such year.

8. The first appropriation made by Congress for advance interest, as provided by the act of January 14, 1889, was made by section 8 of the act and set up on the books of the Treasury as "Advance Interest to Chippewas in Minne-

sota (Reimbursable)." By subsequent annual acts passed in the years 1891 to 1910, inclusive, Congress in each act appropriated $90,000 for the same account. The total amount thus appropriated was $1,890,000. During the fiscal years 1891 to 1925, inclusive, expenditures were made from the advance interest account for the use and benefit of the Chippewa Indians in Minnesota, amounting to $1,869,929.39.

Reimbursement of the major part of said expenditures was taken as follows: on May 16, 1911, from the "Chippewas in Minnesota Fund," $896,246.93; and on May 16, 1911, and various other dates to March 28, 1927, from the "Chippewas in Minnesota Interest Fund," $973,504.52, making a total reimbursement of $1,869,751.45, or $177.94 less than the total disbursements on this account.

9. In each of the years 1890 and 1892 to 1910, inclusive, Congress made appropriations out of public funds in the total sum of $2,350,559. The purpose was stated in the following (or comparable) words: "To enable the Secretary of the Interior to carry out an Act entitled 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota, and for other purposes,' approved January 14, 1889." Each of the appropriation acts directed that expenditures thereunder should be reimbursed to the United States "from the proceeds of sales of land ceded by the Chippewa Indians under the act [of 1889]" or "out of the proceeds of sale of their lands." These appropriations were carried to the account entitled "Relief and Civilization of Chippewas in Minnesota (Reimbursable)."

During the fiscal years 1891 to 1913, inclusive, expenditures in the total sum of $2,338,625.32 were made under authority of the Secretary of the Interior for the use and benefit of these Indians. Included in the total were expenditures amounting to $328,163.95 made for expenses of the Chippewa Commission; for surveying, allotting, sale, etc., of lands; for expenses, care, and sale of timber; for removals; for transportation, etc., of supplies; for councils and delegations; and for examining and appraising land. The balance of the total sum, amounting to $2,010,461.37, was expended for education; roads; bridges; clothing; provisions and other rations; agricultural implements and equipments; work and

stock animals; feed and care of livestock; hardware, glass, oils, and paints; medical attention; Indian houses; household equipment; fuel and light; hospitals and equipment; pay of mechanics; miscellaneous employees; agricultural aid; miscellaneous agency expenses; agency buildings and repairs; saw and grist mills; miscellaneous building material; pay of farmers; burial of Indians; care of indigent Indians; telephone lines; boats, docks, etc.; per capita cash payments; pay of agents and subagents; pay and expenses of Indian police; and annual celebration of the White Earth Band.

Reimbursement for all these expenditures was taken from the "Chippewas in Minnesota Fund," as follows: on May 16, 1911, $2,196,036.63; on June 11, 1912, $139,550.59, and on May 26, 1913, $3,241.27, making a total of $2,338,-828.49.

10. In addition to the sum of $328,163.95 hereinbefore set forth, the amounts disbursed by defendant for the use and benefit of the Chippewa Indians of Minnesota pursuant to appropriations by Congress to enable the Secretary of the Interior to carry out the act of January 14, 1889, and for which defendant was reimbursed out of the "Chippewas in Minnesota Fund" on May 16, 1911, June 11, 1912, and May 26, 1913, included expenditures made by it for the following uses and purposes: Expenditures for education aggregating $1,033,879.01; expenditures for roads in the sum of $37,-714.77; for bridges, $3,972.14; for clothing, $3,475.18; for provisions and rations, $69,275.42; agricultural implements and equipment, $29,895.16; for work and stock animals, $34,-841.80; for feed and care of livestock, $23,173.78; for hardware, glass, oils and paints, $32,378.62; for medical attention, $102,400.90; for Indian houses, $170,019.30; for household equipment, $14,424.69; for fuel and light, $29,672.84; for hospitals and equipment, $54.29; for pay of agency mechanics, $100,387.58; for miscellaneous agency employees, $184,029.22; for agricultural aid, $26,031.89; for miscellaneous expenses of operating Indian agencies in Minnesota, $8,227.06; for the erection and repair of various Indian agency buildings in Minnesota, $15,473.47; for saw and grist mills, $18,456.96; for miscellaneous building materials, $10,-504.48; for pay of Indian farmers, $26,785.93; for the burial

of Indians, \$591.79; for the care of indigent Indians, \$16,-479.65; for telephone lines, \$601.89; for boats and docks, \$11,189.56; for per capita payments, \$25.20; for pay of agents and subagents, \$1,350.00; for pay and expenses of Indian police, \$86.82; and for the holding of annual celebrations of the White Earth Band, \$5,061.97. The aggregate of all these items is \$2,010,461.37.

11. On or about May 16, 1911, defendant, by acts of Congress reimbursed itself from the "Chippewas in Minnesota Fund" for expenditures made for the use and benefit of the Chippewa Indians of Minnesota for the following purposes: For a drainage survey of ceded land, \$30,453.79; for an Indian school at Leech Lake, Minnesota, \$19,782.50; for an Indian school at Red Lake, Minnesota, \$35,000; for Indian school buildings for Chippewa Indians in Minnesota, \$17,-974.54, the total of the amounts so reimbursed being \$103,210.83.

12. Defendant, by acts of Congress, reimbursed itself from the "Chippewas in Minnesota Fund" on the following dates for amounts previously expended by it for the use and benefit of the Chippewa Indians of Minnesota as follows: On June 15, 1915, for drainage surveys on lands ceded under the Act of January 14, 1889, and the agreements entered into thereunder, \$3,234.88, and on March 28, 1927, for education of Chippewas in Minnesota, \$1,000.

13. The total amount covered by defendant into or by it credited to the "Chippewas in Minnesota Fund" either as proceeds of sales of land and timber or from other sources from the dates of the making of the cessions and agreements aforesaid to the end of the fiscal year 1927, the last date covered by the General Accounting Office Report herein, was \$17,662,325.70. The total amount withdrawn from this fund by defendant as reimbursement for its advances of interest and other expenditures for the use and benefit of the Chippewa Indians of Minnesota from its appropriations made by Congress out of public funds was \$3,967,465.79, leaving a net total of all credits to the fund, exclusive only of the amounts reimbursed as aforesaid, of \$13,694,859.91.

14. In each of the years from 1889 to 1910, inclusive, and in 1914 and 1915 Congress made appropriations from public

funds for the use and benefit of the Chippewa Indians in Minnesota. The total amount appropriated was $4,986,-495.55. The acts making such appropriations in every instance directed that expenditures thereunder be reimbursed to the United States from the funds of the Chippewa Indians in Minnesota. The appropriations were allocated to and set up on the books of the Treasury in nine separate accounts designated as:

Relief and Civilization of Chippewas in Minnesota (Reimbursable).

Advance Interest to Chippewas in Minnesota (Reimbursable).

Negotiating with, and Civilization of, Chippewas of Minnesota (Reimbursable).

Surveying and Allotting for Chippewas in Minnesota (Reimbursable).

Indian Schools, Chippewas in Minnesota: Buildings (Reimbursable).

Indian School, Red Lake, Minn.: Buildings (Reimbursable).

Indian School, Leech Lake, Minnesota: Buildings (Reimbursable).

Drainage Survey, Chippewas of Minnesota (Reimbursable).

Education, Chippewas of Minnesota (Reimbursable).

The total amount expended from these nine accounts for the use and benefit of the Chippewa Indians in Minnesota was $4,941,029.66.

Reimbursement from the funds of these Indians was taken as follows:

From the principal fund:		
May 16, 1911		$3, 820, 439. 05
June 11, 1912		139, 550. 59
May 26, 1913		3, 241. 27
June 15, 1915		3, 234. 88
March 28, 1927		1, 000. 00
		3, 967, 465. 79
From the interest fund:		
May 16, 1911, to March 28, 1927	$973, 504. 52	
July 5, 1916 (additional)	84. 58	
		973, 589. 10
Total		4, 941, 054. 89

The total amount reimbursed exceeded the total expenditure by $25.23.

15. Annually during the years 1911 to 1926, inclusive, Congress appropriated and made available during the fiscal years 1912 to 1927, inclusive, various amounts, aggregating $2,754,500, from the "Chippewas in Minnesota Fund" (the principal fund) for promoting civilization and self-support among the Chippewa Indians of Minnesota.

The following table shows (a) the fiscal years, (b) the balance in the "Chippewas in Minnesota Fund" at the beginning of each fiscal year, (c) the total amount appropriated and made available for each fiscal year, (d) citations to the appropriation acts, and (e) for each fiscal year the relation by percentage of the items in column (c) to the items in column (b):

Fiscal year	Amount of fund	Amount appropriated	Stat.	Percent of fund
1912	$4,099,606.24	$168,500.00	36–1065	4.1
1913	4,382,924.96	166,000.00	37–525	3.7
1914	4,995,438.82	170,000.00	38–88, 90	3.4
1915	5,740,995.54	266,000.00	38–590	4.6
1916	6,108,399.64	161,000.00	38–1228	2.6
1917	6,277,587.96	197,250.00	39–134	3.1
1918	5,605,827.26	197,000.00	39–977	3.5
1919	5,788,770.28	186,000.00	40–572	3.2
1920	5,839,863.52	193,000.00	41–13	3.3
1921	5,928,211.49	71,000.00	41–419	1.2
1922	6,001,814.71	105,200.00	41–1235	1.7
1923	4,709,719.30	141,570.00	42–569	3.0
1924	6,192,937.48	145,000.00	42–1190	2.3
1925	4,860,394.96	213,150.00	43–42, 407, 411, 1329	4.3
1926	3,942,636.10	185,330.00	43–1158, 1162	4.7
1927	4,855,308.99	188,500.00	44–471, 475	3.8
Total appropriated		2,754,500.00		

The Secretary of the Interior, in a report dated November 8, 1927 (filed on March 5, 1930), at pp. 6 and 7 stated:

> Attention is invited to that part of Section 7 of the Act of January 14, 1889, providing as follows:
>
> "Provided, That Congress may, in its discretion, from time to time during said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of the principal sum, not exceeding five per cent thereof."
>
> The following statement shows the amounts appropriated annually from 1912 to 1927, inclusive, and the approximate expenditures which included sums for

agency expenses, maintenance of schools, aiding indigent Chippewa Indians, construction and support of hospitals, tuition of Chippewa children enrolled in public schools, purchases of homes for Indians, etc. [Citations to Statutes, which agree substantially with those in the table next above, are here omitted]:

Fiscal year	Appropriated	Expended
1912	$168, 500. 00	$142, 211. 93
1913	166, 000. 00	145, 675. 60
1914	170, 000. 00	161, 598. 19
1915	266, 000. 00	263, 432. 63
1916	161, 000. 00	155, 393. 98
1917	197, 250. 00	181, 729. 51
1918	197, 000. 00	189, 727. 25
1919	186, 000. 00	182, 893. 16
1920	193, 000. 00	176, 983. 12
1921	71, 000. 00	66, 178. 82
1922	105, 200. 00	98, 340. 32
1923	141, 570. 00	126, 333. 63
1924	145, 000. 00	133, 168. 54
1925	190, 000. 00	172, 242. 55
	23, 150. 00	
1926	185, 330. 00	159, 715. 72
1927	188, 500. 00	170, 642. 79
Total	2, 754, 500. 00	2, 526, 267. 74

The report of the Comptroller General contains an analysis of all expenditures made from the "Chippewas in Minnesota Fund" during the fiscal period 1905–1927.

16. In addition to the amounts taken by defendant from the "Chippewas in Minnesota Fund" as reimbursement for its advances of interest and certain of its expenses under the Act of January 14, 1889, amounts taken by defendant from that fund to reimburse itself for moneys expended under appropriations to enable the Secretary of the Interior to carry out the Act of January 14, 1889, and for other purposes, the amounts expended by defendant from that fund pursuant to appropriations made by Congress "for the purposes of promoting civilization and self-support among said Indians," and amounts taken by defendant under congressional authority from the fund and disbursed by it in per capita cash payments for the use and benefit of the Chippewa Indians of Minnesota as hereinafter set forth, defendant, between June 30, 1904, and June 30, 1927, took and disbursed from the "Chippewas in Minnesota Fund" for

the use and benefit of the Chippewa Indians of Minnesota without authority of any act of its Congress specifically appropriating the same "for the purpose of promoting civilization and self-support," the further sum of $547,421.25.

The said sum of $547,421.25 is part of the whole sum of $669,606.34 expended by defendant from the "Chippewas in Minnesota Fund" for the benefit of the Chippewa Indians of Minnesota under authority of the act of January 14, 1889 (*supra*), for expenses, surveying, allotting, sale, etc., of lands; expenses, care, and sale of timber; removals; transportation of supplies; councils and delegations; examining and appraising land, as more fully set out hereinafter.

17. Included in the amounts disbursed by defendant from the "Chippewas in Minnesota Fund" other than the amounts disbursed therefrom for purposes authorized by the act of January 14, 1889 (*supra*), and as per capita cash payments of principal as hereinafter set forth were the following amounts expended by defendant for the use and benefit of the Chippewa Indians of Minnesota for the following purposes: For education, $439,592.00; for roads, $67,692.52; for bridges, $4,432.42; for payments to the Minnesota Public School System as tuition on account of the attendance of Chippewa Indian children, $140,854.85; for payments to the Minnesota Public School System for the purchase of school grounds and the erection of school buildings constituting a part of the Public School System and the property of the State, $43,662.96; for the purchase of lands for allotments to individual Indians, $40,017.31; for clothing, $4,981.01; for provisions and rations, $100,650.41; for medical attention to Indians requiring same, $492,224.95; for Indian houses erected for various individuals, $73,533.47; for household equipment, $10,192.85; for fuel and light, $77,093.54; for hospitals and equipment available to such individuals as might require hospitalization, $114,822.61; for pay of mechanics connected with Indian Agencies in Minnesota, $86,-975.66; for miscellaneous Indian Agency employees, $358,-383.63; for the transportation of supplies, $36,924.26; for miscellaneous expenses of Indian Agencies in Minnesota,

$44,453.10; for the erection and repair of various buildings and structures, including sewer and water systems, etc., of Indian Agencies in Minnesota, $10,869.61; for council and delegations, $63,411.67; for pay of Indian police, $342.40; for the burial of Indians, $2,268.72; for the annual celebration of the White Earth Band, $8,381.10; for the care of indigent Indians, $65,130.89; for the erection and maintenance of telephone lines, $13,567.76; for a payment to certain former chiefs of the Mille Lac Band of Chippewa Indians, $11,000.00; and for opening Indian Reservations, $33.49. The total of these amounts is $2,311,493.19.

The foregoing amounts were disbursed by defendant from the "Chippewas in Minnesota Fund" during the fiscal years ending June 30, 1905, to June 30, 1927, both inclusive, and the amounts so disbursed for each of the purposes during each of the fiscal years correctly appear in Disbursement Schedule No. 10, pages 182–233, General Accounting Office Report herein, which is hereby referred to and made a part hereof as a basis for the computation of interest.

18. In section 8 of the act of January 14, 1889, Congress appropriated from public funds $60,000 to pay "for procuring the cession and relinquishment, making the census, surveys, appraisals, removal, and allotments." This amount was carried to the account entitled "Negotiating with, and Civilization of, Chippewas of Minnesota (Reimbursable)." During the fiscal years 1889 to 1894, inclusive, expenditures for expenses of the Chippewa Commission amounting to $57,023.53 were made and on May 16, 1911, reimbursed to the United States from the principal fund.

In each of the years 1890 to 1899, inclusive, and in 1903, 1904, and 1906, Congress appropriated from public funds a total sum of $567,936.55 for the carrying out of the act of 1889, and particularly for surveys, appraisals, removals, allotments, expenses of the Commission, etc. This amount was carried to the account entitled "Surveying and Allotting for Chippewas in Minnesota (Reimbursable)."

During the fiscal years 1891 to 1907, inclusive, expenditures for expenses of the Commission, surveying, allotting, sale,

etc., of lands; expenses, care and sale of timber, and examining and appraising land, amounting to $567,921.13, were made, and on May 16, 1911, reimbursed to the United States from the principal fund.

19. Disbursements were made for the benefit of the Chippewa Indians of Minnesota from "Chippewas in Minnesota Fund" during the fiscal years in the amounts following:

Fiscal Year:	*Disbursements*	
1905	$29, 499. 39	
1906	44, 626. 49	
1907	57, 003. 27	
1908	45, 805. 07	
1909	39, 678. 15	
1910	50, 454. 59	
1911	35, 961. 44	
1912	164, 606. 39	
1913	173, 821. 06	
1914	198, 720. 78	
1915	204, 477. 95	
1916	227, 560. 09	
1917	1, 691, 593. 98	
1918	207, 399. 70	
1919	215, 432. 80	
1920	201, 197. 63	
1921	107, 899. 54	
1922	1, 358, 712. 79	
1923	117, 870. 07	
1924	1, 500, 930. 90	
1925	973, 377. 13	
1926	929, 190. 64	
1927	182, 210. 74	
Total		$8, 758, 030. 59

The purposes for which these disbursements were made are as follows:

Per capita cash payments		$5, 684, 341. 60
Expenses surveying, allotting, sale, etc., of lands	$18, 762. 69	
Expenses, care and sale of timber	531, 484. 43	
Removals	942. 04	
Transportation of supplies	36, 924. 26	
Councils and delegations	63, 411. 67	
Examining and appraising land	18, 081. 25	
		669, 606. 34

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Drainage surveys	$74.99	
Agricultural implements and equipment	19,242.77	
Work and stock animals	19,184.56	
Feed and care of livestock	49,303.91	
Hardware, glass, oils, and paints	10,083.51	
Agricultural aid	23,243.76	
Saw and grist mills	7,876.17	
Miscellaneous building material	6,103.28	
Pay of interpreters	8,341.42	
Pay of farmers	42,485.82	
Boats, docks, etc	6,974.08	
Investigating land frauds	11.12	
		$192,925.39
Education	439,592.00	
Roads	67,692.52	
Bridges	4,432.42	
Payment to Minnesota Public School System for tuition	140,854.85	
For buildings and grounds	43,662.96	
Purchase of land for allotment	40,017.31	
Clothing	4,981.01	
Provisions and other rations	100,650.41	
Medical attention	492,224.95	
Indian houses	73,533.47	
Household equipment	10,192.85	
Fuel and light	77,093.54	
Hospitals and equipment	114,822.61	
Pay of mechanics	86,975.66	
Miscellaneous employees	358,383.63	
Miscellaneous Agency expenses	44,453.10	
Agency buildings and repairs	10,869.61	
Pay and expenses of Indian police	342.40	
Burial of Indians	2,268.72	
Annual celebration of White Earth Band	8,381.10	
Care of indigent Indians	65,130.89	
Telephone lines	13,567.76	
Payment to Mille Lac chiefs	11,000.00	
Opening Indian reservations	33.49	
		2,211,157.26
Total disbursements		$8,758,030.59

20. During the period January 14, 1889, to June 30, 1934, the United States expended out of its public funds for the use and benefit of the Chippewa Indians of Minnesota the sum of $5,065,878.95, no part of which sum has been reimbursed to the United States.

21. In accord with the following acts of Congress, May 18, 1916 (39 Stat. 135); November 19, 1921 (42 Stat. 221); January 25, 1924 (43 Stat. 1); January 30, 1925 (43 Stat. 798); and February 19, 1926 (44 Stat. 7), per capita payments were made by the Secretary of the Interior from the principal fund in the Treasury to the credit of plaintiffs. The amounts and dates of payments appear in the following table:

Fiscal year ending June 30th:	*Amount distributed*
1917	$1,490,668.40
1918	7,107.22
1919	2,167.37
1920	4,962.80
1921	2,873.20
1922	1,270,666.39
1923	5,491.80
1924	1,353,096.76
1925	774,761.91
1926	768,898.11
1927	3,647.64
Total principal disbursed in cash	5,684,341.60

22. Since the per capita distributions out of said permanent funds made by defendant as set forth in the preceding finding a number of persons receiving such payments have died; the record herein shows the persons so dying, and the amounts distributed to such decedents only to June 30, 1927; and the amounts so disbursed by defendant in per capita payments out of said principal fund to persons who thereafter died, and the respective fiscal years during which such amounts were so disbursed to such decedents are shown by the following tabulation:

Fiscal year ending June 30th:	*Amount*
1917	$231,162.00
1922	91,300.00
1924	58,700.00
1925	21,300.00
1926	13,050.00
Total	415,512.00

23. In addition to the ratification provided in the acts set forth in Finding 21, each Indian receiving a payment under

said acts was required by the Secretary of the Interior to sign the following form of release:

> In consideration of the payment represented by check No. ----, dated ------ ----, ------, I hereby release and quitclaim unto the United States forever all my right, title, and interest in and to that portion of the principal fund of the Chippewa Indians of Minnesota arising under the act of January 14, 1889, which has been or shall be distributed per capita to said Indians under the Act of ------, to the extent of $----.

The court decided that the plaintiffs were not entitled to recover.

ORIGINAL OPINION ANNOUNCED NOVEMBER 14, 1938

BOOTH, *Chief Justice*, delivered the opinion of the court:

The special jurisdictional act enabling the plaintiff Indians to sue in this court appears in Finding 1. The case grows out of alleged failure of the defendant to discharge its obligations under the act of January 14, 1889 (25 Stat. 642), and especially Sections 7 and 8 of that act. A judgment for a large sum of money is sought.

The act of January 14, 1889, has been several times before the Supreme Court. It is unnecessary to elaborate upon what the Supreme Court held to be its scope and purpose. It is sufficient for the purposes of this case to state that Congress in enacting the act clearly intended to put in effect the Government's prevailing Indian policy, i. e., secure the dissolution of the various Indian Bands and Tribes involved, allot them lands in severalty, dispose of surplus lands for their benefit, and otherwise seek to civilize the Indians themselves. This act appears in Finding 4.

The plaintiff Indians assented to the provisions of the act of 1889, *supra*. The various bands ceded their lands in accord with the same. Allotments were made and accepted and the surplus lands, both timber and agricultural, were sold, accumulating a sum of money aggregating in excess of sixteen million dollars.

Inasmuch as the crucial issue in this case is more or less restricted to Sections 7 and 8 of the act of 1889, despite

repetition, we insert at this point the provisions of the same, to wit:

> SEC. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living in cash, in equal shares: *Provided*, That Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made, until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; the

payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the first five years be expended in procuring live-stock, teams, farming implements, and seed for such of the Indians to the extent of their shares as are fit and desire to engage in farming, but as to the rest, in cash; and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess, for all the advances of interest made as herein contemplated and other expenses hereunder.

SEC. 8. That the sum of one hundred and fifty thousand dollars is hereby appropriated, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, to pay for procuring the cession and relinquishment, making the census, surveys, appraisals, removal and allotments, and the first annual payment of interest herein contemplated and provided for, which money shall be expended under the direction of the Secretary of the Interior in conformity with the provisions of this act. A detailed statement of which expenses, except the interest aforesaid, shall be reported to Congress when the expenditures shall be completed [25 Stat. 645].

The plaintiff Indians contend that the provisions of these sections created a conventional trust and thereby precluded the defendant from disbursing any of the funds involved except in strict accord with the same, which is the equivalent of saying that in this instance the conceded authority of Congress over tribal Indian lands and funds does not obtain. The defendant not only failed to observe the terms of the trust but, on the contrary, has depleted the trust fund by various disbursements to the Indians. The amount thus disbursed is the amount of the judgment sought.

The record establishes the fact that the defendant has disbursed from the fund created by Sections 7 and 8 of the act of 1889. We say disbursed—perhaps we should say has reimbursed the Treasury from the fund to the extent of appropriations made by Congress and paid to the plaintiff Indians, Congress authorizing the reimbursement in most instances, for purposes not mentioned in the act of 1889 and contrary to the terms of the alleged trust agreement.

The act of 1889 is free from ambiguity. On the date of its enactment and subsequent approval it was the indisputable

intent of Congress to conserve the tribal funds accruing from the sale of the surplus lands as provided therein. Doubtless it was the belief of Congress that the income from the fund that was to be disbursed to the Indians annually during the fifty-year period would be sufficient, along with their individual landed estates, to maintain them, and at the same time would encourage the adoption of the ways of the Whites for themselves and future generations.

The total sum taken from the fund involved represents sums appropriated by Congress from public money which was paid directly to the Indians or for their benefit. The defendant in no way profited in doing what was done. It is not alleged and assuredly not established that the necessity for the appropriations made did not exist; hence, if the plaintiff Indians may recover all they claim, this court must hold that the fund was not a tribal one, and Congress in passing the act of 1889 surrendered its authority over Indian tribal funds and lands.

The twelve or thirteen bands of Chippewa Indians were tribal Indians. They held their reservations as tribal Indians. *Kadrie case*, 281 U. S. 206. True, some individual allotments had been made on certain reservations, but the greater acreage of their reservations was held and occupied as communal Indian lands. They were recognized by the defendant as tribal Indians, and the only possible distinction between the Chippewa Indians of Minnesota as a tribe and any other tribe of Indians was the division of the tribe into various bands. It was and is not now unusual to find a tribe of Indians made up of several bands who hold a reservation exclusive of other bands. This fact does not destroy the identity of the tribe as such or alter the character of the title by which their lands are held.

What was accomplished by the act of 1889 was a voluntary merger of all the tribal lands, participated in by all the bands of the Chippewa Tribe, and consummated by cessions of all the Chippewa bands. It was in effect, and resulted in, a resumption of a tribal unit, always known as the Chippewa Indians of Minnesota—an abandonment of band organization and a return to a single tribal one.

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The plaintiff Indians insist that the act of 1889 created "a new class or entity" without tribal organization, possessing no lands or other property, devoid of leadership, and in fact having none of the characteristics of an Indian band or tribe. To this contention we cannot assent. The bands did cede their separate reservations and agreed to take allotments on the Red Lake and White Earth Reservations, and thereafter participate upon an equal basis in the benefits to be derived from so doing. It was a transition from separate band organization to a unitary one, governed in precisely the same manner and under precisely the same laws applicable to the control and disposition of Indian lands by the Government.

The participants in this consolidation were all tribal Chippewa Indians. The lands ceded were tribal lands. The Indian bands surrendered whatever advantage they possessed because of band organization in the interest of their brethren, and agreed that all the Chippewa Indians in Minnesota, irrespective of bands, should take alike in the great Chippewa estate in Minnesota.

The fact that subsequent to the cession the ordinary Indian tribal organization in all its detail did not prevail is, we think, unimportant. Subsequent to the cession the lands were disposed of as communal Indian lands, the funds were recognized as also communal, and the entire administration of the Indian estate was conducted upon the basis of tribal lands and funds. The benefits to accrue from the same vested without discrimination in all the Chippewas of Minnesota. This was not the creation of a new class; it was simply the amalgamation of an old one.

Aside from all that has been said, it is of much more importance to give attention to the plaintiffs' contention that the defendant surrendered its plenary authority over Indian tribal lands and funds when the act of 1889 was approved. The contention is a novel one. It is, of course, conceded that this power and authority exist. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

The plaintiff Indians argue that because Congress lacked the power to take the land of one of the bands and give it

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to another, it therefore lacked the power to do what was done without the consent of the Indians, and thus surrendered its plenary power and authority over tribal Indian lands and funds. It is true Congress did not exert to the limit the power and authority it possessed when the act of 1889 was approved, but this fact does not import its non-existence. The limitations of the power extend only to an impairment or destruction of vested rights. *Gritts* v. *Fisher*, 224 U. S. 640.

The lands and funds of the various bands of Indians were tribal and subject to the plenary power and authority of Congress. This fact is indisputable. Congress made annual appropriations for the bands and treated and recognized them as tribal. The Indians themselves made no claim to the contrary. When the Indians ceded the lands they transferred the title they possessed, and this transaction did not in any sense emancipate the Indians, render them *sui juris*, or dissolve the relationship of guardian and ward previously existing.

The act of 1889 expressly withholds from the Indians the administration of its provisions. Congress reserved the power and authority to administer it. Every provision of the law exhibits with positiveness the recognized inability of tribal Indians to adjust and settle this vast and valuable estate. Not a single provision of the act in any way imports either a willingness or intent to surrender the power and authority Congress possessed in the premises, or to abandon its traditional and legal authority to care for the welfare and civilization of tribal Indians.

It is true that the act of 1889 contained a referendum clause. It was not to become effective until approved by a certain number of the Indians and the President. This fact does not, however, change the established relationship of the defendant and the Indians. The mutual assent of the interested parties to the enactment of the act did not create a contract.

When Congress abandoned the policy of treating Indian Tribes as dependent nations with whom the Government made treaties respecting their tribal affairs, as it admittedly did in 1871, it assumed and has since then continuously ex-

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ercised the power and authority to manage, control, regulate, and adjust tribal Indian affairs, including their lands and funds. The assumption of this plenary authority has been more than once approved by the Supreme Court. *Lone Wolf* v. *Hitchcock*, *supra*.

In the enactment of statutes similar to the act of 1889 designed to relieve and civilize Indian tribes, Congress did not intend to surrender this existing plenary power and authority if subsequent conditions exhibited an acute necessity to alter the terms of a pre-existing act so long as subsequent legislation did not take from the Indians vested rights. As to lands and funds remaining after the vesting of rights of property, and so long as the subsequent acts did not take from the tribe lands belonging to it and give them to strangers or appropriate them to the Government, the plenary power and authority of Congress over Indian tribal lands and funds exist.

The case of *Gritts* v. *Fisher*, *supra*, directly in point, negatives the contentions of the plaintiffs advanced in this case. The Supreme Court in deciding the above case said:

> It is conceded, and properly so, that the later legislation is valid and controlling unless it impairs or destroys rights which the act of 1902 vested in members living September 1, 1902, and enrolled under that act. As has been indicated, their individual allotments are not affected. But it is said that the act of 1902 contemplated that they alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Intermarriage Cases*, 203 U. S. 76, 93. It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued. *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Wallace* v. *Adams*, 204 U. S. 415, 423. [224 U. S. 648.]

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Section 74 of the act of 1902 (32 Stat. 716), the initiatory legislation subsequently changed by the act of April 26, 1906 (34 Stat. 137), as amended June 21, 1906 (34 Stat. 325, 340), involved in the *Gritts* v. *Fisher case*, *supra*, was submitted to the tribe for ratification. This section of the act of 1902 reads in part as follows:

> This act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following [32 Stat. 727].

The case of *Sizemore* v. *Brady*, 235 U. S. 441, involved the "original Creek Agreement." The issue raised was similar to the one in this case. It was contended by the plaintiff that the original agreement was a grant *in praesenti* and vested absolute rights to allotments of Indian lands, and that Congress was powerless to impair or alter the original agreement. In deciding adversely to this contention the court said:

> On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant *in praesenti* and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due process of law clause of the Fifth Amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant *in praesenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living mem-

bers of the tribe or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living. In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate v. Trapp*, 224 U. S. 665, 671 [235 U. S. 449, 450].

We need not go back and discuss either the necessity of each individual band of Chippewas assenting to the passage of the act of 1889, or whether as a legal proposition the estate of all the bands might have been adjusted and finally settled by the exertion of the plenary power and authority of Congress. It seems to us of little consequence to the solution of the issues presented by the record. We know what the individual bands did. We know that as tribal Indians they accepted all the benefits accruing to them under the act of 1889 and in accord with its terms. We know that they approved the act of 1889, and whatever may have been their rights under separate band organization we know they voluntarily surrendered them to acquire others under the act of 1889.

What we intend to hold and what we think the record sustains is that "About the beginning of the last century the Chippewas constituted one of the larger Indian tribes in the northerly part of the United States. In early treaties they were dealt with as a single tribe and were shown to be occupying a large area reaching from Lake Huron on the east to and beyond Lake Superior on the west. In later treaties they were regarded as divided into distinct bands; and particular bands—in some instances a single band and in others a limited plurality of bands—were recognized as occupying separate areas in Michigan, Wisconsin, Minnesota, and eastern Dakota, and as entitled to hold or cede the same independently of other bands and of the Chippewas as a whole." *Chippewa Indians* v. *United States*, 301 U. S. 358, 360, 361.

The various bands acting independently did cede their tribal lands to the United States; pooled, as it were, all the

Chippewa Indian lands in Minnesota previously held by individual bands, and by so doing rendered them the communal Indian lands of all the Chippewa Indians of Minnesota. The bands by assenting to the act of 1889 returned to a single tribal organization precisely as the same had existed before their recognition as separate bands.

If Congress intended in 1889 to create a new Indian entity possessing characteristics wholly different from a tribal one, endowed with legal authority to receive the benefits of the sale and disposition of tribal lands and funds free from the control and authority of Congress, it is the first time in the history of Indian legislation that this has been done. It was, indeed, a wide and unusual departure from the established Indian policy of the Government. It is clear to us that Congress did not so intend.

The contentions of the plaintiffs as we understand them concern exclusively the rights of the Chippewa Indians of Minnesota and their issue living on the date stated in the act of 1889 for the distribution of the so-called trust fund. This must be so, for the Chippewa Indians of Minnesota now living and those who survived the enactment of the act of 1889 have participated in and received the monetary benefits brought about by the Government's legislation which depleted the fund, and in no way have suffered loss or damage.

In other words, the present members of the Chippewa Indians of Minnesota cannot have a complaint, and if the plaintiffs are to recover for the designated "remaindermen" they will have received not only the benefits of the so-called trust fund during all these years but the Government will be required to duplicate the distribution to their heirs at the end of the fifty-year period. This conclusion we think is inescapable.

We have considered with care the numerous cases cited in the briefs of counsel and are absolutely unable to find one which holds that under an act of Congress providing for the settlement of Indian tribal estates a succeeding Congress is powerless to alter a former act, when after the enactment of the first act the succeeding one deems it essential for the good

of the tribe to exercise its plenary administrative power over unallotted Indian lands and undistributed Indian funds. *Lone Wolf* v. *Hitchcock*, *supra;* *Winton* v. *Amos*, 255 U. S. 373; *United States* v. *Creek Nation*, 295 U. S. 110; *United States* v. *Mille Lac Band of Chippewas*, 229 U. S. 498; *Kadrie case*, *supra*.

In the case of *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 308, the Supreme Court held:

> We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine and is not one for the courts.

The established rule applies to the tribal funds of an Indian tribe or tribes whenever an existing Indian tribe challenges the administration of its estate under an act or acts of Congress.

The first claim of plaintiffs is for $232,011.21. Section 7 of the act of 1889 provided that the Government should advance to the Indians each year after the passage of the act the sum of $90,000, known as advance interest. These annual advancements were to continue until the permanent fund arising from the sale of surplus lands equalled or exceeded $3,000,000, less any actual interest accruing in the meantime.

The Government made annual appropriations of $90,000 in accord with the act for the fiscal years 1892 to 1911, inclusive, or a total sum of $1,890,000. On May 16, 1911, reimbursement was taken by the Government as follows: $896,246.93 from the permanent fund, and on later dates, $973,504.52 from the interest fund, or a total reimbursement of $1,869,751.45, resulting in a failure of the Government to obtain a full reimbursement of public money taken from the Treasury of $177.94.

The plaintiffs insist that the Government in taking reimbursement for advanced interest payments took from the permanent fund $232,011.21 more than the act of 1889 authorized. No contention is advanced that all the money involved was disbursed in any other way than for the exclusive benefit of the Indian tribe, nor is it contended that reimbursement for the sums appropriated by the Government was unauthorized, the only contention being that the permanent fund under the act of 1889 was depleted to the extent noted, to the prejudice of the remaindermen.

The annual Indian appropriation bill for 1911 contained among other provisions the following:

> For advance interest to the Chippewa Indians in Minnesota, as required by section seven, Act of January fourteenth, eighteen hundred and eighty-nine, entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," to be expended in the manner required by said Act, ninety thousand dollars: *Provided*, That the amount of this appropriation and all moneys heretofore or hereafter to be appropriated for this purpose shall be repaid into the Treasury of the United States in accordance with the provisions of the Act of January fourteenth, eighteen hundred and eighty-nine: *Provided further*, That the Secretary of the Treasury shall transmit to Congress on the first Monday in December, nineteen hundred and ten, a statement, by tribes and funds, of all moneys appropriated by Congress since July first, eighteen hundred and seventy-five, required by law to be reimbursed to the United States from Indian tribal funds held in trust or otherwise, showing the extent to which such reimbursements have been, or may now be accomplished [36 Stat. 276].

The wording of this portion of the appropriation act discloses that Congress in its conception of its obligations under the act of 1889 appropriated each year the $90,000 advance interest payment without respect to the interest fund accumulating upon the permanent fund from year to year. Obviously, if Congress had been aware of the extent of interest accumulations it could have omitted these advance appropriations at least eight years sooner.

While technically it may be asserted that Congress did not strictly observe the provisions of the act of 1889, it is indis-

putable that the present plaintiffs suffered absolutely no loss, and now seek to gain a benefit from a transaction which did them no harm whatever. The reason advanced by the Government is a weighty one. While advancements of interest were appropriated by the Government the sums advanced were not completely disbursed in any one fiscal year.

The bookkeeping system of the Treasury discloses two separate accounts—one known as payment into the permanent fund and the other into the interest fund—and in the addition of unexpended balances as well as the addition and subtraction of sums from the interest fund the Secretary of the Interior made the reimbursements as he construed the act of 1889 to authorize. In the multitude of entries in a large and continuing account over a long term of years the Government is not to be charged with an error that results in no loss or damage to any living Indian.

The act of 1889 provided that from the proceeds of the sale of the ceded lands the Government should be reimbursed for carrying out the act. The plaintiffs do not challenge the amount the Government appropriated and disbursed for this purpose. The present item in suit is a claim for $203.17, an alleged overreimbursement from the permanent fund.

In view of our judgment and opinion in this case, the defendant's defense to this item is invulnerable, and in no event was the reimbursement taken in excess of $25.23. There were a number of appropriations made by Congress for the benefit of the plaintiffs, in each of which it was expressly provided that the Government should be reimbursed therefor from the plaintiffs' funds. The act of 1889 contained certain provisions which obligated the Government to provide sufficient funds for administering the act, and for these sums the Government was to be reimbursed. Obviously, no additional legislation was required to authorize such reimbursements. The sums for which the Government took reimbursement, in addition to these, were appropriations made by Congress concerning the welfare and civilization of the tribe and providing that they should be reimbursed for the same.

The plaintiffs seek to limit this item to one expenditure for carrying out the act of 1889 and object to treating the

reimbursable items as a whole. This position is untenable. Congress retained its plenary power and authority over Indian tribal lands and funds and provided that the sums appropriated were to be reimbursed from the Indian funds. See Finding 9.

The Government by appropriation acts appropriated $19,782.50 for an Indian school at Leech Lake, Minnesota; $30,453.79 for a drainage survey of ceded lands; $35,000 for an Indian school at Red Lake, Minnesota, and $17,974.54 for school buildings for the Chippewas of Minnesota. In each appropriation act it was expressly provided that the sums thus appropriated and disbursed should be reimbursed to the Government out of the funds involved in this case. To hold that the act of 1889 precluded the Government from taking ample Indian funds of a tribe for the above civilizing purpose is contrary to established precedents.

In the discussion of items which are to follow it is not essential to enter into the details of accounting. The findings point out the sums involved, and we have adverted to typical items illustrative of all involved. As previously stated, the plaintiffs' case rests upon a lack of Congressional authority to take from the funds created by the act of 1889 any sum not expressly stated to be reimbursable. If this is the principle of established law, manifestly the plaintiffs are entitled to recover.

Aside from reimbursable sums mentioned in the act of 1889, additional items in suit involve reimbursement of large sums appropriated by Congress and expended for welfare and civilization of the tribe, which were either not authorized by the act or exceeded the sums authorized. One item is education. The act of 1889 expressly authorized the expenditure of one-fourth of interest accumulations during the fifty-year period to be expended under the direction of the Secretary of the Interior for education. It is alleged and proved that more than one-fourth was expended, and subsequently the Government was reimbursed from the fund.

In the process of extending instrumentalities for obtaining an advancement of civilization, education becomes a

leading and controlling factor. If Congress adopted the policy subsequent to 1889 of reimbursing appropriations made to Indian tribes for this purpose out of available Indian tribal funds, the courts may not intervene. The act of 1889 did not create a contract, and Congress did not by its enactment render the Government powerless to provide as in its wisdom it deemed appropriate for the education of the Indians. It retained control of unexpended tribal funds.

It is asserted that facilities for education inured to individual Indians and not to the tribe. It is unnecessary to combat the argument. *The Chickasaw Nation* v. *United States*, 87 C. Cls. 91. Agricultural implements, clothing for the needy, provisions and rations for the hungry, livestock, and food for their maintenance; fuel and light for Indian homes; hospitals for the sick; funds for the burial of the dead, as well as innumerable other items restricted exclusively to the status of an Indian tribe, may, when Congress so prescribes, be paid for out of Indian tribal funds, irrespective of the provisions of the act of 1889.

In 1911 Congress adopted the policy of defraying the expense of Indian agencies and other costs of governmental activities in Indian affairs, either in whole or in part, out of available Indian tribal funds. In this case Congress observed this policy and provided that sums expended for this purpose should be reimbursable. The plaintiffs contest the item by a contention predicated upon governmental policy obtaining in former years. We will not review the origin and purpose of Indian agencies; it is sufficient to state that Congress determines the Indian policy and we may not challenge it.

Because Congress appropriated as it did between the years 1890 and 1910 the sum of $2,350,559 for the relief and civilization of the Chippewa Indians of Minnesota and directed that the Treasury should obtain reimbursement of this sum "out of the proceeds of sales of land ceded by the Chippewa Indians under the act of 1889, or out of the proceeds of the sale of their lands," it becomes incumbent upon the plaintiffs to establish a diversion of the funds to purposes other than the relief and civilization of the Indians.

Opinion of the Court

The record to warrant a recovery must not conclude with a mere showing that the provisions of the act of 1889 were not strictly complied with. The act of 1889 in its preamble discloses its purpose, and assuredly Congress was not compelled to permit a large population of tribal Indians to stand in need of the facilities of relief and civilization, when the tribe itself possessed ample and sufficient funds to supply the same. Under plaintiffs' contention the status of the tribe remained *in statu quo* for at least a half century if Congress in the meantime had refused appropriations.

Per capita distributions were all made * to the Indians from the funds in accord with the following acts of Congress: 39 Stat. 135; 42 Stat. 221; 43 Stat. 1; 43 Stat. 798; 44 Stat. 7. Manifestly it was essential to make them. Changing economic and social conditions obviously inspired the legislation which altered the provisions of the act of 1889. The present generation of Indians, as well as many who have passed on, accepted these benefits and *they were* beneficial, and they did not then object that the so-called trust fund was being unlawfully depleted. It was not until after all these benefits had been fully realized by the tribe that solicitude was manifested for the designated remaindermen.

The plaintiffs contest an expenditure made by the Government for a drainage survey of ceded lands, and repeating the provisions of the act of 1889 point out that no provision is found therein authorizing this proceeding. It is, of course, true that no express provision authorizing the survey is found in the act. It was accomplished under congressional authority, and what was done inured to the Indians.

The extent of the funds to be realized from the sale of surplus lands was dependent upon their classification. Swamp lands if susceptible to drainage would enhance in value, and what the Government did was for the express benefit of the tribe. To bring the swamp areas into a state of cultivation was in direct accord with the intent of the act of 1889 which by express terms contemplated, if it did not express, an intent to bring the estate to the point of its greatest value.

* See page 47.

Out of the fund arising from the act of 1889 there was expended from 1905 to 1927 the total sum of $8,758,030.59. For the relief and civilization of the Indians for the years 1912 to 1927 the Interior Department expended approximately $2,526,267.74, and the per capita distributions during this same period totaled $5,684,341.60, a total disbursement of $8,210,609.34 either authorized by acts of Congress or disbursed in accord with the provisions of the act of 1889.

The plaintiffs subtract $8,210,609.34 from $8,758,030.59, which leaves $547,421.25, and upon this calculation insist that $547,421.25 was taken from the Indian fund without any authority either from Congress or the provisions of the act of 1889. No charge is made that this sum was disbursed for any other purpose than for the tribe's benefit, and authority must exist for the disbursements made.

The defense, and it is a conclusive one, discloses, and the record sustains the fact, that the report of the Comptroller General shows in detail all expenditures made for the benefit of the tribe from 1905 to 1927, inclusive. During the same period of time expenditures for the survey, allotment, and sale of the ceded lands totaled $669,606.34, and were expressly authorized by the provisions of the act of 1889.

The $8,210,609.34 represents expenditures authorized by acts of Congress and, to say the least, the court would not be warranted in holding that the $547,421.25 was not part of the expenditures authorized by the act of 1889 and did not exact congressional authority. In other words, aside from what has been said, the record fails to establish the contention advanced with that degree of certainty required to warrant a judgment.

In the *Kadrie case* heretofore cited, this language is used in the opinion of the Supreme Court:

> When the act of 1889 was passed the Chippewa Indians in Minnesota comprised eleven bands or tribes occupying ten distinct reservations in that state in virtue of treaties or Executive orders. Collectively, they were regarded as a single tribe and commonly called the Chippewas of Minnesota. They numbered about 8,300, and their reservations contained approximately 4,700,000 acres. They were tribal Indians, under the guardianship of the United States, and held their reservations as tribal lands [p. 208.]

Also, on page 221 of the same opinion, the court said:

> The second question is more easily answered, for not only does the act of 1889 show very plainly that the purpose was to accomplish a gradual rather than an immediate transition from the tribal relation and dependent wardship to full emancipation and individual responsibility but Congress in *many later acts*—some near the time of the decision in question—has recognized the continued existence of the tribe. * * * With the tribe still existing the criticism by counsel for the relators of the Secretary's decision in other particulars loses much of its force. [Italics inserted.]

To sustain the plaintiffs' contentions exacts a holding from this court that the act of 1889 accomplished an "immediate emancipation" of the plaintiff Indians, had the effect of dissolving the relationship of guardian and ward, and placed the Government in the position of being absolutely unable to administer their tribal affairs. This we can not do.

We regret the necessity for lengthy and involved findings of fact, but find no way to avoid them. If, however, we are correct in holding the lands and funds to be tribal ones subject to the plenary power and authority of the Government over the same, the detailed accounting becomes immaterial.

The petition will be dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

SUPPLEMENTAL OPINION

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiffs and defendant file motions to amend the findings and for a new trial. The defendant's motion does not challenge the judgment or opinion of the court. It is confined to amendment of the findings to make some of them more positive and to clarify others. The plaintiffs' motion alleges both errors of fact and law and points out the same, and while the judgment and opinion of the court are challenged, a request for a reargument of the case is not asked.

The plaintiffs contend that one of their principal claims has been inadequately disclosed in the court's findings, and

additional findings are requested in order that the claim may be so stated as not to foreclose a presentation of the same in the event of a review of the court's judgment. The request is a reasonable one and it may be the court did not find *in extenso* with respect to the facts involved. We grant plaintiffs' motion in part and amend our findings accordingly.

Plaintiffs' contention with respect to per capita payments made to the Indians under the acts appended to this opinion is thus stated: "Disbursement of large portions of the principal fund, prior to the termination of the fifty-year trust period, to persons then in being, many of whom are now dead, and who, so far as still living, may or may not survive to the end of the trust period so as to be entitled to share in the final distribution of principal to 'all said Chippewa Indians and their issue then living.' "

The Secretary of the Interior did, in accord with the acts of Congress attached hereto, make per capita distributions from the funds of the Indians in the Treasury to the amount of $5,684,341.60 and manifestly this decreased to this extent the amount of the fund available for distribution at the end of the fifty-year period. Hence the issue presented by the requested findings is identical with plaintiffs' contentions as to all claims preferred.

If a beneficiary under the acts received a per capita payment from the principal fund and thereafter died before the expiration of the fifty-year period there can be no doubt as to the financial consequences to the issue of the Indian at the end of the fifty-year period. The final result, so far as the distributees mentioned in the act of 1889 are concerned, is in no way obscure. That, however, is not the issue. If Congress determined to utilize the existing fund for a generation of tribal Indians who in their judgment needed it to ward off the hardships of life, and who were really the creators of the fund, it was a matter for Congress to determine and not the courts.

Congress did not arbitrarily or capriciously deplete the so-called trust fund in the payment of a per capita distribution. On the contrary, it submitted to the Indians the

question as to whether they wished or disapproved it. A referendum appeared in every act but one authorizing the same. Obviously, the response to the referendums indicated immediate necessities and displeasure with the prolonged period involved in the disposition of the Indian tribal fund.

It is manifestly beyond the jurisdiction of the court to express agreement or disagreement with the provisions of the act of 1889. Congress possesses the authority to care for tribal Indians, and, under established precedents we have cited, the courts may not question its discretion or the exercise of the plenary power they have of right. If the case is restricted to a matter of accounting under the act of 1889 the findings tell the story.

The plaintiffs say that they appear in this case under the special jurisdictional act for and on behalf of "all those entitled to share in the final distribution," meaning all those entitled to receive a share of the fund when the trust period has expired, and it is insisted that the damages suffered by this class occasioned in part by the per capita payments from the fund "are to be here redressed."

If the contention advanced is predicated upon the theory that the jurisdictional act creates rights and consequent liabilities, or by its terms recognizes existing rights under the act of 1889, it is answered by the decision of the Supreme Court in the *Mille Lac Band of Chippewa Indians* v. *United States*, 229 U. S. 498, 500, wherein the following rule applicable to the construction of special jurisdictional acts was established:

> The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians. *United States* v. *Old Settlers*, 148 U. S. 427, 469; *United States* v. *Choctaw &c Nations*, 179 U. S. 494, 735; *Sac and Fox Indians*, 220 U. S. 481, 489.

We find nothing in the record to sustain a finding that the per capita payments here involved were made to the then beneficiaries of interest distributions. The acts authorizing the payments use the terms "permanent" and "principal fund." The sums distributed and the extent of the Indian enrollment negative the fact that the distribution and payments were limited to the interest fund. The variation in sums as to different years is attributable in part to the difference in the amount of per capita payments authorized by the acts.

If the per capita payments were authorized by the act of 1889 and were intended only for beneficiaries of the interest distributions the Secretary of the Interior did not need special legislation to make such distributions. The act of 1889 conferred such authority. The special acts are susceptible to but one construction in our opinion, and that is Congress intended and clearly expressed such an intention to take from available funds in the Treasury to the credit of the Indians and distribute designated amounts to them per capita irrespective of the source from which the fund emanated.

The taking of a receipt from each distributee was a precautionary measure adopted by the Secretary of the Interior in formulating his regulations. This procedure has, we think, nothing to do with the solution of the issues in this case. The Secretary was authorized to administer and pay out a large sum of money and the maintenance of strict regulations involving accounting was indispensable. As a matter of fact, the regulations promulgated by the Secretary were in no way unusual.

Plaintiffs argue that notwithstanding per capita payments made to individual Indians who had died prior to June 30, 1927, and to others now living who may survive the trust period, the entire amount distributed under the special acts should be appropriated by Congress and restored to the so-called trust fund. As to the survivors, the defendant is fully protected by receipts, and as to decedents the payment was unauthorized.

If the judgment of the court is erroneous and plaintiffs' contention hereafter sustained, the above argument will be-

come important; it is now a stated principle of accounting, and may become important in fixing the sum to be appropriated if this court is wrong in its adjudication of the case.

We have gone carefully into the record in considering the motions for a new trial, and we have added this opinion to the original one because the plaintiffs in the brief apparently feel that we neglected both in the findings and opinion to attach to the subject-matter of per capita payments the importance it deserves. On page 37 of the original opinion in the first line of the second paragraph the word "reimbursable" will be stricken out. (See page 41.)

Plaintiffs' request for a new Finding 23 is denied. The subject-matter of the finding involves a statement of existing laws concerning the public school system of Minnesota, a matter of which the courts take judicial notice.

The determinative issue in this case, deducible from the facts involved, depends as we see it upon the one important legal principle: If Congress in enacting the act of 1889 precluded a subsequent Congress from administering the act of 1889 in accord with the existing condition of tribal Indians, and by legislation diverted the fund established by prior legislation in the interest of those then in need of it, does legal precedent exact a reimbursement to the fund of the sums expended? If Congress is without authority to care for the immediate needs of tribal Indians, and yet does so, is a legal liability imposed upon the United States to appropriate again sufficient funds to carry into effect the provisions of an act which by its terms would leave an existing Indian population in what Congress has determined to be a condition of distress and necessity? What we hold is that Congress possesses the exclusive and plenary authority to deal with tribal Indian lands and funds as in its wisdom it deems just. It is a matter within the exclusive jurisdiction of Congress, and if the legislation does not impair vested rights or appropriate Indian property for a public purpose the courts are absolutely without jurisdiction. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

The motions for a new trial are overruled and the motions to amend the findings are allowed in part and overruled in part. The former findings are withdrawn, and

amended findings this day filed, the judgment and former opinion to stand. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WILLIAMS, *Judge*, took no part in this decision.

APPENDIX

The act of May 18, 1916, 39 Stat. 123, 135, provides in part as follows:

> That the Secretary of the Interior, under such rules and regulations as he may prescribe, is hereby authorized to advance to any individual Chippewa Indian in the State of Minnesota entitled to participate in the permanent fund of the Chippewa Indians of Minnesota one-fourth of the amount which would now be coming to said Indian under a pro rata distribution of said permanent fund: *Provided*, That the Secretary of the Interior, under such rules and regulations as he may prescribe, may use for or advance to any Chippewa Indian in the State of Minnesota entitled to share in said fund who is incompetent, blind, crippled, decrepit, or helpless from old age, disease, or accident, one-fourth of the amount which would now be coming to said Indian under a pro rata distribution of said permanent fund: *Provided further*, That any money received hereunder by any member of said tribe or used for his or her benefit shall be deducted from the share of said member in the permanent fund of the said Chippewa Indians in Minnesota to which he or she would be entitled: *Provided further*, That the funds hereunder to be paid to Indians shall not be subject to any lien or claim of attorneys or other third parties.

The act of November 19, 1921, 42 Stat. 221, provides as follows:

> That the Secretary of the Interior be, and he is hereby, authorized to withdraw from the Treasury of the United States so much as may be necessary of the principal fund on deposit to the credit of the Chippewa Indians in the State of Minnesota, arising under section 7 of the act of January 14, 1889 (Twenty-fifth Statutes at Large, page 642), entitled "An Act for the relief and civilization of the Chippewa Indians in the State of

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> Minnesota," and to make therefrom a per capita payment, or distribution, of $100 to each enrolled member of the tribe, under such rules and regulations as the said Secretary may prescribe: *Provided*, That the money paid to the Indians as authorized herein shall not be subject to any lien or claim of attorneys or other parties: *Provided*, That before any payment is made hereunder the Chippewa Indians of Minnesota shall, in such manner as may be prescribed by the Secretary of the Interior, ratify the provisions of this act and accept the same.

The act of January 25, 1924, 43 Stat. 1, provides as follows:

> That the Secretary of the Interior be, and he is hereby, authorized to withdraw from the Treasury of the United States so much as may be necessary of the principal fund on deposit to the credit of the Chippewa Indians in the State of Minnesota, arising under section 7 of the Act of January 14, 1889 (Twenty-fifth Statutes at Large, 642), entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," and to make therefrom a per capita payment or distribution of $100 to each enrolled member of the tribe, under such rules and regulations as the said Secretary may prescribe: *Provided*, That before any payment is made hereunder the Chippewa Indians of Minnesota shall, in such manner as may be prescribed by the Secretary of the Interior, ratify the provisions of this Act and accept same: *Provided further*, That the money paid to the Indians as authorized herein shall not be subject to any lien or claim of attorneys or other parties.

The act of January 30, 1925, 43 Stat. 798, provides as follows:

> That the Secretary of the Interior be, and he is hereby, authorized to withdraw from the Treasury of the United States so much as may be necessary of the principal fund on deposit to the credit of the Chippewa Indians in the State of Minnesota, arising under section 7 of the Act of January 14, 1889 (Twenty-fifth Statutes at Large, 642), entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," and to make therefrom a per capita payment or distribution of $50 to each enrolled member of the tribe, under such rules and regulations as the said Secretary may prescribe: *Provided*, That before any

payment is made hereunder the Chippewa Indians of Minnesota shall, in such manner as may be prescribed by the Secretary of the Interior, ratify the provisions of this Act and accept same: *Provided further*, That the money paid to the Indians as authorized herein shall not be subject to any lien or claim of attorneys or other parties.

The act of February 19, 1926, 44 Stat. 7, provides as follows:

> That the Secretary of the Interior be, and he is hereby, authorized to withdraw from the Treasury of the United States so much as may be necessary of the principal fund on deposit to the credit of the Chippewa Indians in the State of Minnesota, arising under section 7 of the Act of January 14, 1889 (Twenty-fifth Statutes at Large, 642), entitled, "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," and to make therefrom a per capita payment or distribution of $50 to each enrolled member of the tribe, under such rules and regulations as the said Secretary may prescribe: *Provided*, That before any payment is made hereunder the Chippewa Indians of Minnesota shall, in such manner as may be prescribed by the Secretary of the Interior, ratify the provisions of this Act and accept same: *Provided further*, That the money paid to the Indians as authorized herein shall not be subject to any lien or claim of attorneys or other parties.

MOHAWK RUBBER COMPANY v. THE UNITED STATES

[No. 43409. Decided November 14, 1938. Plaintiff's motion for new trial overruled February 6, 1939]

On the Proofs

Income tax; claim for refund.—Where taxpayer on December 12, 1931, filed claim for refund of the entire amount of income tax for 1928, which amount was paid in four installments—March 20, June 17, September 16, and December 16, 1929—it is held that under Section 322 of the Revenue Act of 1928, the claim for refund was properly held by the Commissioner to have been timely filed, within the two-year period, only as to the last installment.

Reporter's Statement of the Case

Same; protest as to disallowances not a claim for credit.—Where taxpayer on December 10, 1930, filed a document protesting against additional assessments for 1927 and 1928 and disallowances contained in revenue agent's report, and alleging errors in said report, it is held that this document was entirely lacking in the essential elements of a claim for credit, which, while it need not be made in any exact form, nevertheless must make known taxpayer's contention for refund or credit in such a manner that the Commissioner would be apprised of taxpayer's desire.

Same; statutory limitations.—The granting of refunds and credits is confined to the limits set by Congress, and specific statutory provisions must be adhered to, no matter how great the equity may be. *Bull.* v. *U. S.*, 295 U. S. 247, and *Dunigan* v. *U. S.*, 87 C. Cls. 404, distinguished.

The Reporter's statement of the case:

Mr. Frederick L. Pearce for the plaintiff. *Morris, Kix-Miller & Baar* were on the briefs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon stipulation:

1. The plaintiff is a corporation duly organized and existing under the laws of the State of Ohio, with its principal office at 1235 Second Avenue, Akron, Ohio.

2. The plaintiff duly filed its Federal income-tax return for the calendar year 1928, on March 15, 1929. That return was a consolidated return, including the plaintiff and its affiliated corporation, the Mohawk Rubber Company of New York, Inc., and disclosed a net income for each corporation, but the entire tax of $82,313.14 shown thereon was by agreement (filed with the Commissioner of Internal Revenue) allocated and assessed against the plaintiff. That sum was duly paid by the plaintiff in four installments, three each of $20,578.28 on March 20, June 17, and September 16, 1929, and a fourth installment of $20,578.30 on December 16, 1929.

3. The plaintiff was affiliated with the same corporation for the calendar years 1926 and 1927, and also for those years duly filed consolidated returns including both corporations. The return for 1926 showed a consolidated net loss for that year (in excess of the net income of the New York Company) all attributable to the plaintiff. In the 1927 return each corporation showed a net income and the net loss for 1926 was deducted from the total net income, showing no tax due on the return for 1927. A relatively small balance of the 1926 net loss was deducted in the return for 1928 as filed.

4. The income-tax returns for 1926, 1927, and 1928 were examined by a revenue agent and he rendered a report on September 6, 1930, in which report some adjustments were made reducing the 1926 net loss (but leaving it all attributable to the plaintiff), and increasing the net income for 1927 and 1928; and further the 1926 net loss was allowed as a deduction up to the amount of plaintiff's net income for 1927, and the balance thereof against plaintiff's net income for 1928 (in a larger sum than was deducted in 1928 return). Based upon these adjustments, the agent's report proposed an income-tax liability and deficiency of $43,-433.46 for 1927 and an income-tax liability of $48,059.80 and an overassessment of $34,253.34 for 1928, all allocated to the plaintiff. It is agreed that the income-tax liabilities are the correct income-tax liabilities for the years 1927 and 1928. The summary page of the revenue agent's report referred to above showed the following summary of plaintiff's tax liability:

Summary

Years:	*Additional Tax*	*Overassessment*
1927	$43,433.46	----------
1928	----------	$34,253.34
Net Additional Tax		$9,180.12

5. A copy of the revenue agent's report was furnished plaintiff, and on December 10, 1930, the plaintiff's agent filed with the Revenue Agent in Charge at Cleveland, Ohio, a document dated December 9, 1930. That document accompanied the revenue agent's report to the Bureau of In-

ternal Revenue, where it was received December 26, 1930. The document was duly subscribed and sworn to by plaintiff's agent and reads as follows:

> Herewith protest against additional tax for the years 1927 and 1928 of The Mohawk Rubber Company of Akron, Ohio, together with power of attorney of Albert Titmas.
>
> A The Mohawk Rubber Company, 1235 Second Ave., Akron, O.
>
> B Ohio Corporation.
>
> C Field Examiner J. F. Schillinger.
> Date of Report September 6, 1930.
>
> D Years 1927 and 1928, Additional Tax $9,180.12.
>
> E Bad Debts, reserves and losses brought forward, etc.
>
> F That I can prove the error in bad debts and the difference in loss brought forward.
>
> G A hearing is requested at the Cleveland office to submit the items in question at an early date.
>
> H That I, Albert Titmas, of Akron, Ohio, has knowledge that the above statements are true. His certificate to practice before the Treasury Department is on file.

6. On March 3, 1931, the Commissioner of Internal Revenue mailed to plaintiff a deficiency notice for 1927, which incorporated the same adjustments that appeared in the revenue agent's report and determined the same income-tax liability and deficiency for 1927. That letter showed the same income-tax liability and overpayment for 1928 as shown in the revenue agent's report, and accompanying the letter was a blank form of claim for refund which the letter suggested be prepared and filed for 1928.

On May 2, 1931, the plaintiff filed a petition with the United States Board of Tax Appeals, which was entered as Docket No. 57783. On December 12, 1931, the plaintiff filed with the Commissioner, on Form 843, a claim for refund of $34,253.34 of income taxes for the year 1928.

7. On April 8, 1933, the Board of Tax Appeals, on respondent's motion, dismissed the appeal for nonprosecution.

On May 13, 1933, the Commissioner assessed the deficiency for 1927 in amount of $43,433.46 plus interest of $13,447.12.

On June 20, 1933, plaintiff filed a motion with the Board of Tax Appealls to vacate the dismissal, which motion was

denied June 20, 1933. On July 7, 1933, the plaintiff filed (the Commissioner consenting as to venue) a petition for review of the dismissal of the appeal to the Board by the Court of Appeals of the District of Columbia.

On July 13, 1933, the Commissioner, in accordance with section 3226 Revised Statutes as amended by section 1103 of the Revenue Act of 1932, advised the plaintiff that to the extent indicated in certificate of overassessment No. 2209067 the claim for refund for the year 1928 in the amount of $34,253.34 was disallowed on a schedule dated June 9, 1933. A copy of the certificate of overassessment for 1928, showing allowance of $20,578.30, was mailed to the plaintiff on June 21, 1933.

On June 9, 1933, on schedule IT–50196, the allowed amount for 1928, plus interest of $4,206.99, was credited against the 1927 additional assessment of May 13, 1933.

On August 21, 1933, the plaintiff executed and filed with the Commissioner a letter inclosing a petition dated August 18, 1933. The Commissioner responded to plaintiff's letter of August 21, 1933, by letter dated October 7, 1933.

On December 8, 1933, the Commissioner abated the assessment of May 13, 1933 (the 1927 deficiency), as having been assessed prematurely, and the credit from 1928 was eliminated. Refund or credit of the allowed overpayment for 1928 was withheld pending the result of the petition for review of the decision of the Board in the 1927 case. On December 2, 1933, the deficiency for 1927 was reassessed, notwithstanding the petition for review, the plaintiff not having filed a bond.

After the receipt of the letter from the Commissioner dated October 7, 1933, the plaintiff, on January 26, 1934, wrote the General Counsel of the Bureau of Internal Revenue requesting that the 1927 case on appeal to the Circuit Court of Appeals of the District of Columbia and the case for the year 1928 be consolidated in the office of the General Counsel in an effort to dispose of both cases.

In order to have the 1928 case referred to the General Counsel, the plaintiff, on August 4, 1934, agreed to dismiss the 1927 appeal if the Commissioner would refer the 1928

case to the General Counsel. The Commissioner on August 8, 1934, referred the files for 1928 to the General Counsel for an opinion as to whether the balance of $13,675.04 of the overpayment for the year 1928 should be allowed based on the contention that a seasonable claim for refund or credit had been filed.

On August 11, 1934, the petition for review of the Board decision in the 1927 case was dismissed on plaintiff's motion. On August 23, 1934, the allowed overassessment for 1928 of $20,578.30, together with interest thereon to December 2, 1933, in the sum of $4,890.02 was scheduled to the collector and thereafter was credited against the 1927 additional assessment. The certificate of overassessment was mailed by the collector to the plaintiff on August 28, 1934, and was received by the plaintiff the next day.

On November 26, 1934, the General Counsel advised the Commissioner that it was the opinion of that office that no seasonable claim for refund or credit had been filed for the year 1928 except as to the last installment, and that the action of the Bureau in refusing to allow in full was correct. The files were then returned to the Commissioner's office. On January 10, 1935, the Commissioner advised plaintiff by letter of that action. The balance of $13,675.04 of the overpayment of income taxes for 1928 has not been credited or refunded to plaintiff or its affiliated company.

8. Against the assessment for 1927 made December 2, 1933, of $43,433.46 with interest of $14,888.75, a total of $58,322.21, there has been credited and paid a total of $33,-314.52, leaving a balance of $25,007.69 yet due for 1927, as per the collector's records up to August 23, 1937.

Notice and demand for the payment of the assessment of $58,322.21 was made by the collector on December 7, 1933, with a second notice and demand on December 26, 1933.

In view of the fact that payments are being made by plaintiff company from time to time, and that credits are being made against plaintiff's tax liability for 1927 from time to time, the amount shown above as the balance due for 1927 is subject to verification with the Collector's records after decision on the 1928 issue here involved.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

The plaintiff is suing to recover an admitted overpayment of income tax for the year 1928. The material facts are set out in the findings. The plaintiff alleges a timely claim for credit was filed for the year in question. It is only necessary to repeat the facts bearing upon this issue to show that the position of the plaintiff is untenable.

The stipulated facts show that plaintiff, with an affiliated corporation, duly filed consolidated income tax returns for 1926, 1927, and 1928. The entire tax shown on the return for 1928 was, by appropriate agreement of the parties, allocated to, assessed against, and paid by plaintiff in quarterly installments. After the return for 1928 had been made, a revenue agent audited the returns for the three years and recommended an additional tax for 1927 of $43,433.46 and reported an overassessment for 1928 of $34,253.34. The application of the overassessment of 1928 against additional tax for 1927 resulted in the plaintiff apparently being liable for a net additional tax for the two years of $9,180.12. The plaintiff was furnished a copy of the report dated September 6, 1930, and on December 10, 1930, the taxpayer filed a protest against the report with the internal revenue agent in charge. The protest was duly forwarded to the Bureau of Internal Revenue by the agent in charge. It is this document which plaintiff contends constitutes a timely claim for credit which would permit recovery in this proceeding.

Although we do not regard them as material, certain proceedings were taken thereafter, among which were the issuance by the Commissioner of a deficiency notice incorporating the same deficiency and overassessment as shown by the report of the revenue agent; the filing by plaintiff of a petition for review by the Board of Tax Appeals; the dismissal of the petition by the Board; an appeal to the Court of Appeals of the District of Columbia; and other actions in reference to the assessment, collection, refund, credit, or abatement of the amounts appearing in the report of the revenue agent. Through all these proceedings no change was made in the amounts of the additional tax and overas-

sessment, as shown by the report of the revenue agent. The correctness of these amounts is confirmed by the stipulation of the parties in this proceeding.

When the Commissioner mailed his deficiency notice for 1927 on March 3, 1931, which included not only the determination of the deficiency but also the overassessment for 1928, he enclosed a blank form of claim for refund and suggested that it be filled out and filed by plaintiff in order to protect it against the running of the statute of limitations for any amount which might ultimately be found to have been overpaid for 1928. However, the plaintiff delayed in following this suggestion and did not file the claim for refund for 1928 until December 12, 1931, over nine months after the refund claim had been sent to it. The claim, as filed, asked for the refunding of $34,253.34, the exact amount shown in the Commissioner's determination. Section 322 of the Revenue Act of 1928 (45 Stat. 791, 861) allowed two years after the payment of the tax in which to file a refund claim. Only the last installment of the tax paid came within that period. The three other installments had been paid more than two years prior to the filing of the claim. The Commissioner refused to recognize the claim for refund as effective for the three installments but did grant the claim for the last quarterly payment for 1928 in the full amount of $20,578.30. In his action on the claim for refund, the Commissioner issued a certificate of overassessment for 1928 in which he showed an overassessment in the amount set out in the revenue agent's report, $34,253.34, and the application of the last quarterly payment of $20,578.30 as a credit and the disallowed balance of $13,675.04 on the ground that this balance was barred by the statute of limitations, the first three quarterly payments for 1928 having been paid more than two years prior to the date of the filing of the claim for refund.

The plaintiff contends that it is entitled to recover this balance of $13,675.04 on the basis that the document filed December 10, 1930, in which it makes a protest to the revenue agent's report, and which was within the two year period after the payment of the taxes, was in reality an informal claim for credit and therefore recovery should be

had. An examination of the document shows on its face that the plaintiff was questioning the amounts of the items of bad debts disallowed by the revenue agent and the application of these losses as brought forward by the agent's method of application. There was no claim for credit. The document starts off with the words "Herewith protest against additional tax for the years 1927 and 1928 * * *." The agent's report shows the application of the overassessment to the deficiency of $43,433.46 for 1927 and the balance due of $9,180.12 after this application. The ground of the protest was "I can prove the error in bad debts and the difference in loss brought forward." The plain reading of these words is that plaintiff desired to prove the agent had not allowed enough for bad debts and to show that the agent had not correctly brought forward its losses. Naturally, if more bad debts were allowed, it would affect the balance and also make a difference in the "loss brought forward." The increasing of the item of allowable bad debts could affect both the overassessment and the deficiency. A greater allowance could increase the overassessment and diminish the deficiency. Therefore, it is apparent in the document of December 10, 1930, that plaintiff was objecting to the items of bad debts which the revenue agent had not seen proper to allow and his method of bringing forward the losses. The instrument is entirely lacking in the essential elements of a claim for credit. It is well settled that a claim for refund or credit need not be made in any exact form, nevertheless, it also has been held essential that the taxpayer claiming a refund or demanding a credit make known his contention in such a manner that the Commissioner would be apprised of what he desired. Cf. *Gustava D. Anderson* v. *United States*, 79 C. Cls. 417. A claim for credit in ordinary, plain language simply means that the taxpayer desires the amount due him to be applied to the amount which he owes. In other words, that he has made an overpayment and an underpayment and he desires that the overpayment be applied and credited to the underpayment, and a balance struck. Applying this test to the document of December 10, 1930, it is plainly apparent that no request or demand is indicated that any amount be credited.

On the contrary, its plain meaning is what is plainly and clearly set forth in the words "error in bad debts and the difference in loss brought forward." It is an expression of dissatisfaction with the method of determination of bad debts by the revenue agent and the way the loss was carried over. The report showed that the overpayment had been applied to the underpayment which resulted in a balance due by the taxpayer. Without a request, under the usual Bureau procedure, had the taxpayer accepted the Commissioner's determination, the overpayment would have been credited to the deficiency, provided a timely claim was filed. The action of the plaintiff, in filing a petition with the Board of Tax Appeals and including both the 1928 overpayment and the 1927 deficiency, definitely shows the plaintiff was not seeking a credit but a review of its tax liability on items for both years. There is not the slightest indication of satisfaction with the determination made by the Commissioner but, on the contrary, a protest as to the method of arriving at amounts of bad debts and loss brought forward.

There is a further contention by plaintiff that recovery can be had for the 1928 balance withheld on the ground of equitable credit or recoupment as held in *Bull* v. *United States*, 295 U. S. 247, and followed in *Dunigan* v. *United States*, 23 Fed. Sup. 467, *ante*, p. 404. There is no analogy between those cases and the instant case. Later decisions hold that the granting of refunds and credits is confined to the limits set by Congress. Specific statutory provisions must be adhered to. No matter how great the equity may be, if the claim does not come within the statutory limits, it cannot be maintained. *Andrews* v. *United States*, 84 C. Cls. 460; 302 U. S. 517; *Garbutt Oil* v. *United States*, 89 Fed. (2d) 749, 302 U. S. 528, and *McEachern* v. *Rose*, 86 Fed. (2d) 231, 302 U. S. 56.

The action of the Commissioner confining his allowance of credit to the last installment of the tax is sustained. The petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Syllabus

FEDERAL EXPORT CORPORATION v. THE UNITED STATES

[No. H–106. Decided November 14, 1938. Plaintiff's motion for new trial overruled March 6, 1939]

On the Proofs

Income tax; computation of income of a consolidated group of corporations.—The doctrine laid down in *Swift and Company* v. *United States* (69 C. Cls. 171) is reaffirmed, that in computing the net income of a consolidated group of corporations "the separate corporations are the taxpayers, and the affiliated group is merely a tax-computing unit, not a taxable unit." *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 328 cited.

Same; no deduction of loss where there is no income.—Since losses, if deducted at all, must be deducted from the net income of the corporation sustaining the loss, there can be no deduction from the consolidated income of a loss sustained by a company which for the particular year in question has no income.

Same; right of the Court to set aside stipulation.—Without regard to the rule in other courts, and in cases where the Government is not the defendant, it is held that the Court of Claims has the right, in order to prevent an injustice being done the Government, to set aside a stipulation which has been inadvertently entered into by one of the Government's attorneys even though the stipulation involves a matter of law; the Court having previously held in *Giddings* v. *United States* (29 C. Cls. 12, 15) that where a case was submitted on stipulation either party might withdraw it at any time before a decision is announced, and in the case of *Jones and Laughlins* v. *United States* (42 C. Cls. 178) that the Court of Claims had authority to set aside a stipulation involving a mistake of law in order to protect the Government.

Same.—When a claimant seeks to avail himself of a stipulation in writing by a representative of the Government he takes it subject to a motion of defendant's counsel to set the agreement aside.

Same; allocation of income as set forth in books of account.—Where two affiliated corporations acted as separate entities, kept separate books and made agreements with each other, and in accordance therewith the corporate taxpayers made tax returns to the Government, it is held that each corporation is a separate taxpayer, and allocation of income on any other basis is denied.

Same; allocations of losses by subsidiaries having no net income.—Where two subsidiaries each showed a loss for the year 1918, these losses could not under the decision in the *Swift* case be taken as a deduction by either of said corporations in that year, and where advances were made to the said two corporations in 1919 by the parent company (plaintiff), but the said two companies continued to exist after 1919, and, so far as the evidence goes, the loans from the parent company to the two subsidiaries were not liquidated until later years, there is nothing in the record from which a loss to the plaintiff (parent corporation) on these advances in 1919 can be determined; and change in allocation of losses must be refused.

Same.—Where one subsidiary in 1919 advanced money to another, which was then operating at a loss, and the evidence shows that the second subsidiary was sold in 1926 or 1927, but there is nothing in the record from which it can be determined when, if ever, a loss on this transaction was sustained by the first subsidiary, a reallocation cannot be made as asked by plaintiff.

Same; deduction for advances to subsidiaries and affiliates.—There is no authority in cases cited for holding that a loss occasioned by an advance is deductible in the year in which the advancement was made when there is no evidence showing that the loss was determined in that year. *Atlantic City Co.* v. *Commissioner*, 288 U. S. 152; *Burnet* v. *Aluminum Goods Co.*, 287 U. S. 544, 548; *Autocar Co.* v. *Commissioner*, 84 Fed. (2d) 772, distinguished.

The Reporter's statement of the case:

Mr. Henry M. Ward for the plaintiff. *Brewster & Steiwer* were on the briefs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Fred K. Dyar* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a New York corporation with its office and principal place of business at 42 Broadway, New York City.

2. At all times during the years 1918 and 1919 plaintiff was affiliated (because of stock relationships hereinafter more particularly shown in certain instances) with the following corporations, for which consolidated income and profits tax returns were filed for those years: Cosmopolitan Shipping Company, Lower Broadway Realty Company,

Commercial Iron & Steel Company, Anglo-Oriental Shipping Company, and New Mexico Central Railway Company.

On and after October 14, 1918, plaintiff was affiliated with the Sligo Iron & Steel Company because of stock relationships hereinafter shown.

The above-mentioned corporations were determined by the Commissioner of Internal Revenue (hereinafter referred to as the Commissioner) to be affiliated for tax purposes, in accordance with the provisions of section 240 of the Revenue Act of 1918 (40 Stat. 1057, 1081), for the calendar years 1918 and 1919, except the Sligo Iron & Steel Company, which was determined to be affiliated only from October 14, 1918.

3. On or about June 15, 1919, plaintiff, on behalf of itself and the affiliated corporations referred to in finding 2, filed a consolidated income and profits tax return for the calendar year 1918, showing a net income for the taxable year of $2,045,255.80, an invested capital of $2,746,958.89, and a total income and profits tax due of $1,486,145.12, on account of which plaintiff made payments as follows:

March 20, 1919	$393, 958. 43
June 16, 1919	176, 889. 32
September 16, 1919	285, 423. 87
December 29, 1919	285, 423. 87
Total	$1,141,695. 49

On or about November 25, 1919, plaintiff filed a claim for the abatement of the balance of the tax assessed, namely, $344,449.63, claiming that under the provisions of sections 327 and 328 of the Revenue Act of 1918 it had been overassessed at least to that extent.

4. On or about July 14, 1920, plaintiff filed a claim for refund of $836,245.37 for the calendar year 1918 on the ground that a net loss had been sustained by the consolidated group for 1919 which should be deducted from the consolidated net income for 1918 under the provisions of section 204 (b) of the Revenue Act of 1918.

5. As a result of a field investigation of the consolidated returns filed by plaintiff for the calendar years 1918 and 1919 the Commissioner notified plaintiff on or about February 25, 1923, that he had determined the consolidated net income of the group for 1918 to be $2,368,558.54, the consolidated net

loss for 1919 deductible from the consolidated net income for 1918 to be $1,469,298.19, leaving the sum of $899,260.35 as the consolidated net income taxable for 1918, the consolidated invested capital in the amount of $2,172,627.30, and the total tax liability for the group, $582,251.76. However, since $4,114.30 had been assessed against the Lower Broadway Realty Company as a separate corporation, one of plaintiff's subsidiary companies, and paid by that company, the total tax liability of plaintiff and affiliated companies was reduced to $578,137.46. The Commissioner advised plaintiff further that inasmuch as the sum of $1,486,145.12 had been assessed against plaintiff and its affiliated companies, and its correct tax liability had been determined to be $578,-137.46, a certificate of overassessment was being issued for the difference, namely, $908,007.66. Of the amount shown in the certificate of overassessment, $289,519.90 was abated and the balance of $618,487.76 was refunded to plaintiff April 1, 1923. The allowance shown in the certificate of overassessment of $908,007.66 took into consideration plaintiff's claim for abatement of $344,449.63 referred to in finding 3 and plaintiff's claim for refund of $836,245.37 referred to in finding 4.

6. February 7, 1924, the Commissioner communicated with plaintiff in regard to its request for consideration under the provisions of section 328 of the Revenue Act of 1918 (40 Stat. 1057, 1093), and suggested in effect that, since the limitation on refunds in favor of plaintiff for 1918 was about to expire, a claim for refund should be filed in order to protect the rights of plaintiff against the running of the limitation pending the consideration of the appeal for special assessment. In accordance with such suggestion plaintiff, on March 4, 1924, filed a claim for refund for 1918 of $1,141,695.49.

7. On or about April 30, 1925, plaintiff filed a further claim for refund for 1918 of $130,292.22, assigning as grounds therefor that such claim was being filed for the purpose of supplementing an informal claim previously filed with respect to depreciation of the Lower Broadway Realty Company, amortization of the Sligo Iron & Steel Company, and a claim for special assessment.

8. Subsequent to the filing of the claims for refund referred to in findings 6 and 7, the Commissioner made a reaudit of the consolidated returns filed by plaintiff on account of itself and affiliated corporations for 1918 and 1919, giving consideration in such reaudit to the grounds advanced in the foregoing claims for refund. As a result of such reaudit the Commissioner advised plaintiff, January 21, 1926, of the issuance of a certificate of overassessment for 1918 of $5,438.01 and the rejection of the balance of those claims. In that determination the consolidated invested capital for 1918 was determined in the same amount as in the previous audit, namely, $2,172,627.30, and the income and losses of the several companies were determined as follows:

Name	Income	Loss
Federal Export Corporation	$352, 500. 32	
Cosmopolitan Shipping Company	2, 408, 660. 34	
Lower Broadway Realty Company	42, 356. 20	
Commercial Iron & Steel Company		$40, 597. 02
Anglo-Oriental Shipping Company		6, 678. 44
New Mexico Central Railway Company		121, 288. 10
Sligo Iron & Steel Company		276, 741. 80
Total	2, 803, 516. 86	445, 305. 36
Aggregate net income for the consolidated group		2, 358, 211. 50

The only change made in that audit on account of income or loss of the respective corporations was an increase in the loss of the Sligo Iron & Steel Company in the net amount of $10,347.04 on account of a depreciation and amortization adjustment.

In making that reaudit the Commissioner determined a net loss of $1,465,550.67 for the consolidated group for 1919 as follows:

Name	Income	Loss
Federal Export Corporation		$1, 513, 653. 98
Cosmopolitan Shipping Company	$504, 049. 03	
Lower Broadway Realty Company	144, 785. 03	
Commercial Iron & Steel Company		4, 322. 02
Anglo-Oriental Shipping Company		4, 614. 47
New Mexico Central Railway Company		202, 860. 93
Sligo Iron & Steel Company		470, 887. 55
Total	648, 834. 06	2, 196, 338. 95
Aggregate net loss for the consolidated group		1, 547, 504. 89

In making his determination on reaudit the Commissioner reduced the losses of the several companies set out above, on account of losses resulting from the sale of cer-

tain assets (deemed by the Commissioner capital assets), before applying the aggregate net loss for 1919 as a deduction from the aggregate net income for 1918. The losses on the sale of those assets so determined were as follows:

Name	Loss
Federal Export Corporation	$26, 305. 26
" " "	11, 800. 00
Cosmopolitan Shipping Company	42, 353. 42
Anglo-Oriental Shipping Company	618. 86
New Mexico Central Railway Company	876. 68
Total	$81, 954. 22

By deducting those losses of $81,954.22 from the aggregate net loss previously computed of $1,547,504.89, the Commissioner determined a net loss for 1919 for the consolidated group of $1,465,550.67 which he deducted from the aggregate net income for 1918 of $2,358,211.50 and thereby arrived at a consolidated net income for tax purposes for 1918 of $892,660.83. On the basis of that net income and the consolidated invested capital heretofore referred to, namely, $2,172,627.30, the Commissioner determined an overassessment for the consolidated group as follows:

Previously assessed	$1, 486, 145. 12
Previously allowed	908, 007. 66
	578, 137. 46
Correct tax liability	572, 699. 45
Overassessment	$5, 438. 01

9. On or about February 1, 1927, plaintiff filed a claim for refund of $578,137.46 for 1918 and assigned as grounds therefor that losses on the sale of Liberty Bonds in the amount of $80,458.68 had been improperly disallowed by the Commissioner in the determination of the consolidated net loss for 1919 and that plaintiff was entitled to a deduction for amortization in the amount of $614,665.13. The claim for refund was rejected by the Commissioner March 11, 1927.

10. After this suit had been instituted for the recovery of income and profits taxes for 1918, the Commissioner, at plaintiff's request, gave further consideration to certain of

the contentions advanced by plaintiff and as a result thereof had certain recomputations made of the tax liability of plaintiff and its affiliated corporations for 1918. Since a net loss for 1919 was involved, the income and losses of the several companies for the two years were recomputed. As a result of such reconsideration and in his final recomputation, prior to entering into a stipulation with plaintiff and the filing of such stipulation with this court, as hereinafter shown, the Commissioner reduced the net income of the Lower Broadway Realty Company for 1918 from $42,356.20 to $7,284.94 by the allowance of additional depreciation in the amount of $35,071.26, and reduced the income of the same company for 1919 from $144,785.03 to $109,393.82, by an allowance of additional depreciation in the amount of $35,391.21. In the computation referred to in finding 8, in computing the consolidated net loss for 1919, the aggregate consolidated net loss for 1919 had been reduced by certain losses (which included losses on the sale of Liberty Bonds) on the ground that they were losses on the sale of capital assets and therefore not to be included in determining a consolidated net loss. In the final recomputation referred to in this finding, the Commissioner sought to allow the losses on the sale of Liberty Bonds as a part of the consolidated net loss for 1919, but in making the computation the Commissioner, instead of merely adjusting the consolidated net loss as previously determined by him on account of these items, further reduced the net income of plaintiff and increased the loss of the Cosmopolitan Shipping Company and thereby gave rise to duplicate deductions which are included in the tabulations of incomes and losses as shown below, since these losses had already been considered in the prior computations in arriving at the net income of plaintiff and the net loss of Cosmopolitan Shipping Company. No other changes were made in the incomes or losses and the same invested capital ($2,172,627.30) was used as in prior computations.

As a result of these adjustments (including the duplicate deductions for losses on the sale of Liberty Bonds), the Commissioner recomputed the income and losses of the several companies for 1918 and 1919 as follows:

Reporter's Statement of the Case

1918

	Income	Loss
Federal Export Corporation	$352, 500. 32	
Cosmopolitan Shipping Company	2, 408, 660. 34	
Lower Broadway Realty Company	7, 284. 94	
Commercial Iron & Steel Company		$40, 597. 02
Anglo-Oriental Shipping Company		6, 678. 44
New Mexico Central Railway Company		121, 288. 10
Sligo Iron & Steel Company		276, 741. 80
Total	2, 768, 445. 60	445, 305. 36
Aggregate net income for the consolidated group		$2, 323, 140. 24

1919

		Income	Loss
Cosmopolitan Shipping Company		[1] $461, 901. 61	
Lower Broadway Realty Company		109, 393. 82	
Federal Export Corporation			[1] $1, 539, 959. 26
Commercial Iron & Steel Company			4, 322. 02
Anglo-Oriental Shipping Company			4, 614. 47
Sligo Iron & Steel Company			470, 887. 55
New Mexico Central Railway Company			202, 860. 93
Total		571, 295. 43	2, 222, 644. 23
Aggregate net loss for the consolidated group			$1, 651, 348. 80
Losses on sale of capital assets not allowable in the computation of a net loss for 1919 deductible from 1918 income:			
Cosmopolitan Shipping Company	$206. 00		
Anglo-Oriental Shipping Company	618. 86		
New Mexico Central Railway Company	876. 58		
			1, 701. 44
Consolidated net loss for 1919 as determined by the Commissioner			1, 649, 647. 36

[1] When correction is made of the error made by the Commissioner in allowing losses on the sale of Liberty Bonds, the net income of Cosmopolitan Shipping Company is increased to $504,049.03, the net loss of plaintiff is reduced to $1,513,653.98, and the consolidated net loss for 1919 (on the group basis) is reduced to $1,581, 194. 66 instead of $1,649, 647. 36 as previously determined by the Commissioner as follows:

		Income	Loss
Cosmopolitan Shipping Company		$504, 049. 03	
Lower Broadway Realty Company		109, 393. 82	
Federal Export Corporation			$1, 513, 653. 98
Commercial Iron & Steel Company			4, 322. 02
Anglo-Oriental Shipping Company			4, 614. 47
Sligo Iron & Steel Company			470, 887. 55
New Mexico Central Railway Company			202, 860. 93
Total		613, 442. 85	2, 196, 338. 95
Aggregate net loss for the consolidated group			$1, 582, 896. 10
Losses on sale of capital assets not allowable in the computation of a net loss for 1919 deductible from 1918 income:			
Cosmopolitan Shipping Company	$206. 00		
Anglo-Oriental Shipping Company	618. 86		
New Mexico Central Railway Company	876. 58		
			1, 701. 44
Consolidated net loss for 1919 as revised by the elimination of the duplicate deductions			1, 581, 194. 66

The several amounts of income and losses set out above were in accordance with the books of the affiliated companies.

The Commissioner deducted the consolidated net loss of $1,649,647.36, as determined by him for 1919, from the aggregate consolidated net income for 1918, as determined by him, in the amount of $2,323,140.24, and arrived at a consolidated net income for tax purposes for 1918 of $673,-492.88. On the basis of that net income and using a consolidated invested capital of $2,172,627.30, as determined in the previous computation, the Commissioner arrived at a total tax liability for the consolidated group of $392,105.06. An original tax had been assessed of $1,486,145.12, but that amount had been reduced by overassessments previously allowed in the amount of $913,445.67, thereby showing at the time this recomputation was made an amount assessed against plaintiff of $572,699.45. The difference between the last-named amount and the tax liability as determined by the Commissioner in his recomputation, namely, $180,594.39, the Commissioner showed as an overassessment, and that result was made a part of a stipulation (in paragraph 10) filed in this court October 31, 1929.

11. Shortly after the filing of the stipulation referred to in the previous finding, this court decided the case of *Swift & Company* v. *United States*, 69 C. Cls. 171, and after that case had been decided defendant filed a motion asking this court, among other things, to permit its withdrawal from paragraph 10 of that stipulation and assigned as the principal ground therefor that the consolidated net loss for 1919 had been applied in arriving at the overassessment of $180,-594.39 in a manner contrary to the principle outlined in *Swift & Company* v. *United States*, *supra*. As heretofore shown, the Commissioner had made his recomputation, as well as his prior computations, on a basis in which the consolidated net loss for the affiliated group for 1919 had been allowed as a deduction from the aggregate consolidated net income for 1918. The case of *Swift & Company* v. *United States*, *supra*, laid down the principle, with limitations and

modifications not here material, that each member of an affiliated group is a separate taxpayer and that accordingly the net loss of each individual corporation for 1919 should be applied separately against the net income (if any) of the same corporation for the preceding year, and that the net loss of one member of an affiliated group for 1919 can not be applied as a deduction from the net income of another member of the affiliated group for 1918. When that principle is applied, using the amounts of income and losses as used by the Commissioner in his final computation, as shown in finding 10, after making correction of the duplicate deductions likewise referred to in that finding, a consolidated net income for 1918 is shown substantially in excess of that previously determined by the Commissioner in the computation in which the Commissioner made his final determination prior to the institution of this suit, and in which the Commissioner determined and allowed an overpayment.

12. Defendant's motion with respect to paragraph 10 of the stipulation was granted by the court with leave "given to either party to offer and have heard such evidence as it may see fit to produce, showing or tending to show the correct net income and invested capital of the plaintiff and its affiliated corporations for the calendar years 1918 and 1919."

Additional evidence was submitted with respect to the organization, financing, management, operation, and related questions pertaining to the several members of the affiliated group for the principal purpose of justifying the conclusion that a reallocation should be made of the income and losses previously determined of plaintiff and the Cosmopolitan Shipping Company.

13. Plaintiff was organized October 7, 1915, and had for its general purpose the carrying on of an export business. This business was begun as a result of war conditions and included the purchase and sale of commodities both at home and abroad, as well as both the exportation and importation thereof. Prior to October 7, 1915, the banking house of Raymond, Pynchon & Company had acquired certain contracts

for the delivery of horses, mules, and other supplies to the Republic of France, and upon its organization plaintiff accepted an offer from Raymond, Pynchon & Company to assign and transfer the contracts to plaintiff in consideration for the issuance to Raymond, Pynchon & Company, or its nominee, of plaintiff's entire capital stock of 3,000 shares of no par value. The contract was carried out by the assignment of the contracts to plaintiff and the issuance of 2,000 shares of stock to Raymond, Pynchon & Company and 1,000 shares to S. C. Munoz, the nominee of Raymond, Pynchon & Company, who had had some prior connection with the negotiations.

14. Raymond, Pynchon & Company were financial agents of plaintiff and its subsidiaries until May 25, 1917, at which time that banking house was succeeded by Pynchon & Company, which acted as financial agents of plaintiff and its subsidiaries until after 1919. The principal members of the firm of Raymond, Pynchon & Company were Harry Raymond and George M. Pynchon, and these two individuals were members of the boards of directors of plaintiff and its several subsidiaries at all times material to this proceeding, and until after the end of 1919. Raymond was president of the Lower Broadway Realty Company and a vice president of plaintiff, Cosmopolitan Shipping Company, and Commercial Iron & Steel Company. Pynchon was a vice president of plaintiff, Cosmopolitan Shipping Company, and Commercial Iron & Steel Company. S. C. Munoz was likewise a director in each of these companies for the same period and was president of plaintiff, Commercial Iron & Steel Company, Sligo Iron & Steel Company, and New Mexico Central Railway Company. Augustus F. Mack (hereinafter referred to) was president of the Federal Shipping Company and its successor, Cosmopolitan Shipping Company, a vice president of plaintiff and of New Mexico Central Railway Company, and a director of each of the companies in the affiliated group. Victor M. Smith was president of the Anglo-Oriental Shipping Company.

The executive committee of plaintiff's board of directors was composed of Munoz, Raymond, Pynchon, Mack, and

Fred L. Watson, treasurer of plaintiff, and while each member of the affiliated group operated as a separate corporate entity with its own officers, directors, bookkeeping system, and staff of employees, the general management of the enterprise was directed largely by the executive committee of plaintiff's board of directors. The stock of the several companies was owned or controlled, either directly or indirectly, by the Raymond and Pynchon group, S. C. Munoz and members of his family, and A. F. Mack and his wife, and the businesses of the several companies were operated in close relationship to each other.

15. At the inception of the enterprise cash for carrying on its operations was furnished by Raymond, Pynchon & Company, and later from substantial profits arising from operations. The business expanded rapidly with the result that for the calendar year 1918 plaintiff showed the following gross revenues and cost thereof:

	Gross amount of contracts	Total cost of purchases and shipments
Machinery Department	$1,382,739.51	$1,272,833.38
Steel Department	1,029,369.42	921,293.30
Export and Agency Department	141,819.04	135,557.81
Food Products Department	1,201,169.13	1,136,513.80
Hay and Grain Department	125,768.98	119,251.44
	3,880,866.08	3,585,449.73

These revenues were exclusive of commissions of $680,-887.42 received by plaintiff from its principal subsidiary, the Cosmopolitan Shipping Company, on account of shipping operations, more particularly referred to in finding 19, and of other items of income. For the same year the Cosmopolitan Shipping Company showed gross operating freight revenue of $4,954,529.35.

16. In connection with the operations of the various companies plaintiff, through its officials, entered into a contractual arrangement on April 27, 1917, with Harry C. Raymond, George M. Pynchon, and S. C. Munoz for their services. As a result of that arrangement salaries were paid

during 1918 and charged to expense against the following companies:

Federal Export Corporation:	
S. C. Munoz, president	$50,000
Harry C. Raymond, vice president	35,000
George M. Pynchon, vice president	35,000
Cosmopolitan Shipping Company:	
Harry C. Raymond, vice president	25,000
George M. Pynchon, vice president	25,000
Commercial Iron & Steel Company and Sligo Iron & Steel Company:	
S. C. Munoz, president	10,000

The contractual arrangement for the services of the above individuals had continued in effect until December 17, 1918, at which time a resolution was adopted for the termination of such arrangement as of December 31, 1918, by a cash payment upon the best terms available, and upon concluding such arrangement to take up with the Cosmopolitan Shipping Company the question of what part of such payment should be borne by that company and what part by plaintiff. Pursuant to such resolution cash payments were made to Raymond and Pynchon of $67,500 each, and of that amount $90,000 was charged to the Cosmopolitan Shipping Company and the remainder, $45,000, to the Federal Export Corporation. These officers, however, continued to serve through 1919 as directors and officers of the group of companies but received no compensation other than heretofore shown. S. C. Munoz received a salary of $60,000 for 1919 from plaintiff and $1,500 in each of the years 1918 and 1919 as president of the New Mexico Central Railway Company. A. F. Mack, as president of the Cosmopolitan Shipping Company, received a salary from that company of $37,500 for 1918 and $24,999.99 for 1919. He also received from the New Mexico Central Railway Company a salary of $1,500 per year as vice president of that company for 1918 and 1919.

Salaries were also paid to other officials of the various companies in the group, with the result that the total salaries paid and allowed as deductions in the consolidated returns for 1918 and 1919 were as follows:

	1918	1919
Federal Export Corporation	$198,000.00	$133,599.97
Cosmopolitan Shipping Company	105,650.00	55,187.50
Commercial Iron & Steel Company	14,833.37	----------
Sligo Iron & Steel Company	2,666.63	22,666.68
Anglo-Oriental Shipping Company	10,751.65	3,162.48
New Mexico Central Railway Company	15,000.00	22,364.35

In some instances salaries were paid by one or more members of the affiliated group without regard to the fact that an officer or officers to whom such salary or salaries were being paid were at the same time rendering services to another member of the group to which no salary was charged. In his determinations the Commissioner allowed the salaries as claimed in the consolidated returns for 1918 and 1919. Legal advice for the group of companies for 1918 and 1919 was paid for by plaintiff in the amount of $20,000 each year and no part of this amount was charged against the accounts of the other companies. The Commissioner allowed deductions on account of these payments as claimed.

17. Since the shipping end of plaintiff's business was important and expanding very rapidly, the organizers of plaintiff secured the services of Augustus F. Mack, a man of large experience in that type of work, to become associated with plaintiff in directing the shipping end of the business. It was soon found expedient to organize a separate company, the Federal Shipping Company, to carry on the shipping business. That company was organized in 1916, with an authorized capital of $25,000, divided into 250 shares of common stock of a par value of $100. That stock was issued to and held by plaintiff until May 14, 1917, when for the stated purpose of separating and severing "the operations and ownership" of the Federal Shipping Company from plaintiff, it was distributed on a pro rata basis to the stockholders of plaintiff. The Federal Shipping Company continued to operate until about June, 1917, when because of the similarity of its name to that of another company, then in existence, it was decided to change the name of the Federal Shipping Company and that change was ac-

complished by the organization of the Cosmopolitan Shipping Company, and the merger of the two companies under the name of the Cosmopolitan Shipping Company. The Cosmopolitan Shipping Company had an authorized capital stock of 10,000 shares, the whole amount of which was issued and exchanged with the stockholders of plaintiff for the 250 shares of stock of the Federal Shipping Company, the exchange being made on a pro rata basis. As heretofore shown, Augustus F. Mack was president of the Federal Shipping Company and its successor, the Cosmopolitan Shipping Company, and was active in the direction of their affairs. He also devoted a substantial part of his time to the business of plaintiff and other affiliated companies.

18. After the organization of the shipping company (hereinafter sometimes referred to for convenience as the Cosmopolitan Shipping Company, since that company was in existence as successor to the Federal Shipping Company for the period involved) the Cosmopolitan Shipping Company had a complete organization as a shipping company with an operating department, traffic department, accounting department, credit department, bill of lading department, and other departments incidental to such business. In connection with the transporting of cargoes by the Cosmopolitan Shipping Company for plaintiff, the usual and regular custom was followed whereby the latter company paid to the former a commission of 5 per cent on the gross freight carried for plaintiff, and such payments were included in the gross income of the Cosmopolitan Shipping Company and allowed as a deduction to plaintiff. These payments were made in accordance with an agreement between the parties and were set forth in the books of the respective companies.

19. At or about the time of its organization plaintiff had secured charters for the operation of three boats for the carrying of cargoes between the United States and France, and upon the organization of the Federal Shipping Company the charters were turned over to that company. The operations under these charters were guaranteed by plaintiff's financial agents, Raymond, Pynchon & Company. Dur-

ing the existence of the Federal Shipping Company operations under these charters were carried on by that company and later by its successor, the Cosmpolitan Shipping Company, and plaintiff received commissions on account of such operations. A boat covered by one of the charters was lost at sea prior to the expiration of its charter and the Cosmopolitan Shipping Company continued to operate the two other vessels under their charters until the charters expired in the latter part of 1917. Upon the expiration of these charters renewals were had in the name of the Cosmopolitan Shipping Company and that company continued its operations thereunder. In connection with negotiations leading to such renewals the owners of the vessels and other parties interested required that Pynchon & Company, successors to Raymond, Pynchon & Company, financial agents of plaintiff, and plaintiff should act as guarantors for the operations under the charters by the Cosmopolitan Shipping Company. The reason for such requirements was that Pynchon & Company had a very high credit rating and plaintiff had acquired some credit standing during the short period of its operations, whereas the Cosmopolitan Shipping Company was relatively unknown from a credit standpoint.

20. The Cosmopolitan Shipping Company realized a net operating income during 1918 of $2,723,451.69 from the operation of the two boats whose charters were renewed as shown in the preceding finding, and that amount was included as a part of its income in the consolidated return filed for 1918. Included also in the consolidated return filed for 1918 was a deduction taken by the Cosmopolitan Shipping Company of $680,887.42 as a commission from the Cosmopolitan Shipping Company to the Federal Export Corporation under an agreement between the two companies for shipping operations. This return was made in accordance with the books of the affiliated companies. The commission was included by plaintiff in its income for 1918, and the same treatment was accorded both items by the Commissioner in the several computations hereinbefore referred to, that is, the commission was allowed as a deduction to the Cosmopolitan Shipping Company and treated as income to plaintiff.

21. From the time of its organization in October 1915, until May 1917, plaintiff, among other things, was engaged in the iron and steel business. May 14, 1917, plaintiff caused the Commercial Iron & Steel Company to be organized, with an authorized capital stock of 1,000 shares without par value, and on the same day the entire authorized stock of that company was issued to plaintiff in consideration of the transfer to it of plaintiff's domestic steel business and $50,000 in cash. Thereafter and throughout 1918 and 1919 except to the extent of the operations of the Sligo Iron & Steel Company, as hereinafter shown, plaintiff continued to handle its export steel business, shipping the steel through the Cosmopolitan Shipping Company, and the Commercial Iron & Steel Company handled the domestic steel business.

July 26, 1917, plaintiff distributed the 1,000 shares of the capital stock of Commercial Iron & Steel Company to the stockholders of plaintiff, certificates for such shares being issued to plaintiff's stockholders on the same basis that they held stock of the plaintiff. At all times thereafter until after the expiration of the year 1919 the stockholders of the plaintiff held stock in the Commercial Iron & Steel Company in the same proportion that they held stock of plaintiff.

22. During 1917 and 1918 plaintiff and/or the Commercial Iron & Steel Company had contracts with the United States and foreign governments for iron and steel products used in the prosecution of the World War. At that time it was difficult to purchase iron and steel products in the open market and, in order to carry out the foregoing contracts, plaintiff and/or Commercial Iron & Steel Company, during the latter part of 1917, made an agreement with the Sligo Iron & Steel Company of Connellsville, Pa., to take practically the entire output of its steel plant and, in furtherance of the operations of the Sligo Iron & Steel Company, the Commercial Iron & Steel Company found it necessary to make substantial advances to that company, the funds being supplied in large part to the Commercial Iron & Steel Company by plaintiff.

23. About April 1, 1918, representatives of plaintiff and the Commercial Iron & Steel Company became convinced

that the Sligo Iron & Steel Company would be unable to carry out its agreements and therefore opened negotiations for the acquisition or control of the Sligo steel plant and its manufacturing facilities in order to produce the iron and steel needed on their war contracts. After an examination of the books and records of the Sligo Iron & Steel Company and an appraisal of its plant and inventory, an agreement was reached whereby on October 14, 1918, the Commercial Iron & Steel Company purchased from the stockholders of the Sligo Iron & Steel Company the entire issue of the capital stock of that company for $119,250 in cash. Between July 1917 and October 14, 1918, the Commercial Iron & Steel Company had made advances from time to time to the Sligo Iron & Steel Company to the extent that on October 14, 1918, there was owing by the latter company to the Commercial Iron & Steel Company $545,415.13. The cash paid in the acquisition of the stock of the Sligo Iron & Steel Company was set up on the books of the Commercial Iron & Steel Company in an account designated "Investment Stock, Sligo Iron & Steel Company." The advances were set up on the books of the Commercial Iron & Steel Company in an account designated "Loans, Sligo Iron & Steel Company," and were carried on the books of the Sligo Iron & Steel Company as indebtedness by it to the Commercial Iron & Steel Company. These accounts were carried on the books of the Commercial Iron & Steel Company until 1922 when the entire plant of the Sligo Iron & Steel Company was sold as hereinafter shown, and the accounts were closed out through the profit and loss account.

24. After the acquisition of the stock of the Sligo Iron & Steel Company, officers and directors were placed in charge of that company who were likewise officers and directors of the plaintiff and other of its subsidiary companies, and thereafter its books were kept in the same offices as those of plaintiff. Likewise after that acquisition and during the war period the plant was operated for the production of articles contributing to the prosecution of the war. At the termination of the war plaintiff endeavored to operate the plant as a peacetime operation, but without success. However, its corporate existence continued until the plant was sold for

$50,000 in 1922, although operation ceased in 1920. From time to time plaintiff advanced money to the Commercial Iron & Steel Company and directly to the Sligo Iron & Steel Company, all advances to the Sligo Iron & Steel Company being charged to the Commercial Iron & Steel Company. As of December 31, 1918, the Commercial Iron & Steel Company showed a liability on its books to plaintiff on account of such advances of $277,000 and as of December 31, 1919, of $875,776.

25. May 24, 1922, plaintiff filed a brief with the Commissioner claiming a deduction of $614,665.13 for amortization of war facilities as a result of the purchase on October 14, 1918, of all the stock of Sligo Iron & Steel Company by the Commercial Iron & Steel Co., determined as follows:

Cash paid for capital stock of Sligo Iron & Steel Company by Commercial Iron & Steel Company	$119, 250. 00
Advances made to Sligo Iron & Steel Company by Commercial Iron & Steel Company from July 1917 to October 14, 1918	545, 415. 13
Total	664, 665. 13
Amount realized upon sale of Sligo Iron & Steel Company's plant in 1922	50, 000. 00
Amortization claimed	$614, 665. 13

26. April 9, 1923, plaintiff filed a brief with the Commissioner claiming a deduction for amortization of $58,645.14 based on expenditures made by the Sligo Iron & Steel Company as a separate entity for additions to its plant from April 6, 1917, to December 31, 1917, at a total cost of $66,-755.01, the balance of the facilities used by that company during the war period and on hand October 14, 1918, having been acquired prior to April 6, 1917. These additional facilities represented a portion of the plant of the Sligo Iron & Steel Company as it existed on October 14, 1918, the date of purchase of the capital stock of that company by the Commercial Iron & Steel Company, and these facilities were included in the assets sold in 1922. The amount of $58,645.14 was determined by using a proportionate part of the selling price of $50,000 received for the entire plant at the time of the sale.

27. In his audit of the consolidated return for 1918 as reflected in the certificate of overassessment of $908,007.66, referred to in finding 5, the Commissioner made no allowance for amortization on account of either the Commercial Iron & Steel Company or the Sligo Iron & Steel Company. However, in his reaudit of the returns as reflected in the certificate of overassessment for $5,438.01, referred to in finding 8, the Commissioner allowed amortization to the Sligo Iron & Steel Company to the extent of $49,966.99, $11,499.25 of which, representing the proportionate amount allowable subsequent to October 14, 1918, was allowed as a deduction in determining the consolidated net income for 1918, the balance thereof being allowable as a deduction to the Sligo Iron & Steel Company as a separate corporation, from January 1, 1918, to October 14, 1918.

28. The balance sheet of the Sligo Iron & Steel Company as of October 14, 1918, based on its books as of that date, was as follows:

	Assets	Liabilities
Cash	$10, 404. 91	
Accounts receivable	15, 573. 97	
Machinery and equipment	542, 496. 38	
Inventories	383, 655. 00	
Real estate	152, 500. 00	
Office building and equipment	20, 000. 00	
Trade marks and good will	33, 000. 00	
Accounts payable		$13, 793. 98
Commercial Iron & Steel Co. (Current account)		92, 415. 13
Notes payable (Commercial Iron & Steel Co.)		453, 000. 00
Preferred stock		250, 000. 00
Common stock		500, 000. 00
Deficit	151, 578. 85	
Total	1, 309, 209. 11	1, 309, 209. 11

29. In a part of a stipulation filed in this proceeding which related to amortization on account of the Sligo Iron & Steel Company's plant, the parties have set forth certain computations under contentions advanced by each of them and certain agreements as to the results which should follow in the event the court should make its decision with respect to the amortization allowance along any one of the several alternative lines mentioned. The stipulation with respect to these matters is contained in paragraphs 18 to 24, inclusive, of the Agreed Statement of Facts filed October 31, 1929,

and these paragraphs are incorporated herein by reference.

30. During 1917 when there was need for steel rails abroad plaintiff's officers and directors conceived a plan of acquiring the properties of the Santa Fe Central Railroad Company, dismantling the railroad and selling the rails abroad. In pursuance of that plan and after investigation plaintiff purchased the bonds and, through a foreclosure sale, acquired the properties of that railroad in or about September 1917. In carrying out such plan plaintiff started to tear up the tracks for the purpose of selling the rails. However, when dismantling operations were started proceedings were begun by interested parties to stop the dismantling of the railroad and to compel the new owners to operate it. As a result of this opposition and of the orders and decrees issued on account thereof, together with the promise of local support and of the prospect for freight if the roadbed and rolling stock were improved, the plan for dismantling the railroad was abandoned and the New Mexico Central Railway Company, which, in the meantime, had been organized and whose stock was owned by plaintiff, proceeded to improve the roadbed, relay track, rebuild bridges, secure new equipment, and operate the railroad. The funds required for putting the railroad into operation were furnished by plaintiff and/or Cosmopolitan Shipping Company. The stock of the New Mexico Central Railway Company was held by plaintiff until about June 13, 1918, when it was transferred to the Cosmopolitan Shipping Company, which held the stock until after December 31, 1919.

31. While the New Mexico Central Railway Company realized operating revenue for 1918 of some $86,000, its operating expenses for that year were some $190,000, thus showing a loss from operations of approximately $104,000. Operating revenues for 1919 showed a substantial increase but operating expenses likewise increased, and there was shown a loss from operations of some $165,000. In order to meet the operating deficits and provide the New Mexico Central Railway Company with necessary funds, advances were at first made by plaintiff and later by the Cosmopolitan Shipping Company until after the end of the year 1919. These advances were entered on the books of plaintiff and

the Cosmopolitan Shipping Company as loans to New Mexico Central Railway Company. These advances were made in the following manner: Whenever cash was needed by the New Mexico Central Railway Company for operations, equipment, or capital expenditures, an officer of that company would draw a draft on plaintiff's treasurer and upon notification, these drafts were paid either by plaintiff or Cosmopolitan Shipping Company. Upon payment of these drafts, demand notes with interest at 6 per cent were drawn for like amounts by New Mexico Central Railway Company in favor of the Cosmopolitan Shipping Company, whether the drafts had been paid by that company or plaintiff. The total of these advances for 1918 was $77,900, and for 1919 $347,380.03, the total of which, that is, $425,280.03, remained unpaid December 31, 1919. As heretofore shown, in several computations with respect to the consolidated returns of plaintiff and its subsidiaries for 1918 and 1919, the New Mexico Central Railway Company sustained a loss in each of these years and these losses were taken into consideration in arriving at the tax due for the consolidated group for these years.

About 1926 or 1927 the stock of New Mexico Central Railway Company was sold to the Atchison, Topeka & Santa Fe Railway Company.

32. During the latter part of 1917 when plaintiff's business was increasing and when it was unable to secure additional space in the building then occupied by it, plaintiff acquired the capital stock of Lower Broadway Realty Company, which owned the building known as No. 42 Broadway, New York City. The offices of plaintiff and its subsidiaries were moved to this building about May 1, 1918, the Cosmopolitan Shipping Company occupying one floor and the plaintiff and the other subsidiaries another floor.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit to recover taxes alleged to have been overpaid for the year 1918, together with interest, aggregating

about a million dollars. The plaintiff is what is commonly referred to as the parent company of six affiliates.

It appears that plaintiff on June 15, 1919, filed on behalf of itself and its affiliates a return for the year 1918 showing a tax of $1,486,145.12 and that payment was made of $1,141,695.49. In November, 1919, plaintiff filed a claim for abatement (requesting a special assessment) and on July 14, 1920, a claim for refund on the ground that a net loss had been sustained for the year 1919 which should be deducted from the 1918 consolidated return. As a result of this claim, the Commissioner of Internal Revenue audited the tax of the group and determined that $578,137.46 was the tax for the group to be paid by the plaintiff. A certificate of overassessment was issued, the unpaid portion of the original assessment abated, and $618,487.76 refunded.

Subsequently the Commissioner made a reaudit of the income of the group and issued a further certificate of overassessment for $5,438.01, and otherwise denied the claim for refund. In determining the tax at this time, the Commissioner computed the 1918 consolidated income and the 1919 consolidated loss and, after deducting the group loss from the group income, calculated the tax accordingly. In determining the amount of the 1919 loss which should be used as a deduction from the 1918 income, the Commissioner excluded a loss of about $80,000 from the sale of Liberty bonds as not deductible. A further claim for refund having been filed and denied, this suit was brought on March 15, 1927. Thereafter, the Commissioner at plaintiff's request gave further consideration to the question of the loss on the Liberty bonds and the correct 1918 taxable income. It was determined that additional depreciation should be allowed for both 1918 and 1919 for one of the affiliates and that the 1919 loss from the sale of Liberty bonds should be deducted from the 1918 income. A recomputation of the tax was then made which indicated an overpayment of $180,594.39. Later, a stipulation was filed in the case indicating that all issues were settled except the question of amortization of facilities of the Sligo Iron & Steel Company, one of the affiliated companies, which question was left open to trial. After the stipulation was filed, this court

decided the case of *Swift & Company* v. *United States*, 69 C. Cls. 171. Subsequently, the defendant, considering that there had been an error made in the computation causing the loss on the Liberty bonds to be in effect deducted twice and also that the computation of plaintiff's tax was in error because it was not in accordance with the method laid down by this court in the *Swift case*, filed a motion for leave to withdraw from paragraph 10 of the stipulation. This motion was sustained by the court with leave "given to either party to offer and have heard such evidence as it may see fit to produce, showing or tending to show the correct net income and invested capital of the plaintiff and its affiliated corporations for the calendar years 1918 and 1919".

After this suit was begun a recomputation was made of the consolidated net income of plaintiff for 1918 in accordance with the principles outlined in *Swift & Company*, *supra*. Taking the amounts of income and losses used by the Commissioner as a basis for the computation and allowing 1919 losses against 1918 income only in accordance with the court's decision in the *Swift case*, it was found that instead of an overassessment as previously determined a very large amount would be due from the plaintiff. As the collection of this sum would in any event be barred, reference to it is made only for the purpose of explaining the situation under which the plaintiff brings this suit.

The first question to be determined is whether this court had a right to set aside the stipulation. It is contended by plaintiff that the rule is that a mistake of law will not justify the setting aside of a stipulation. Without determining whether this is the rule in other courts and in cases where the Government is not the defendant, it is not an invariable rule in this court. We think the court has power to prevent an injustice being done the Government when a stipulation has been inadvertently entered into by one of its attorneys even though the stipulation involves a matter of law. This court in the early case of *Giddings* v. *United States*, 29 C. Cls. 12, 15, held that where a case was submitted on stipulation either party should be allowed to withdraw it at any time before a decision is announced and in the case of *Jones*

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and Laughlins v. *United States*, 42 C. Cls. 178, it was held in substance that this court had the authority to set aside a stipulation involving a mistake of law in order to protect the Government and that when a claimant seeks to avail himself of a stipulation in writing signed by a representative of the Government he takes it subject to a motion of defendant's counsel to set the agreement aside. The prior action of this court with reference to the stipulation filed in the instant case was authorized and is reaffirmed.

There is no substantial dispute as to the facts in the case. The plaintiff claims that under them there is an overassessment of $120,075.07 for which sum it is entitled to judgment. On the authority of *Swift & Company* v. *United States*, *supra*, the defendant insists that there is no overassessment and that plaintiff's petition should be dismissed. On the issue so raised the plaintiff contends—

(1) That the decision in the *Swift & Company case* is erroneous and should be reversed;

(2) That even if the *Swift & Company case* was correctly decided, when proper allocations are made, the plaintiff will be entitled to recover.

The contention of the plaintiff that the decision of this court in the case of *Swift & Company*, *supra*, was erroneous is based upon the theory that in computing the net income of a consolidated group of corporations the total of the losses of the separate corporations should be deducted from the total of the income of the several companies; or, as is stated in plaintiff's brief, group losses should be deducted from group income, and in accordance with this theory the plaintiff argues that the consolidated group is the taxpayer. To the contrary, we held in the *Swift & Company case* that "the separate corporations are the taxpayers, and the affiliated group is merely a tax-computing unit, not a taxable unit." Following this principle, the court held in effect and showed by examples that losses of one company could be deducted only from the gains of that company and not from the consolidated income of the group regardless of the year for which the deduction was sought to be made. Indeed, we think it obvious that if the separate companies are held to be the taxpayers their income and losses must be determined

separately in order to ascertain the basis for the amount of taxes to be paid by each.

The opinion in the *Swift & Company case* was rendered in 1930. Since that time the rules laid down therein have been repeatedly affirmed by various courts and the Board of Tax Appeals and the only dissent was made in a case which was disapproved by the Supreme Court. It is quite true that in many or possibly all of these cases the facts were not precisely the same and the discussion in part referred to the year for which the deduction was sought to be taken. But this makes no difference with the principle involved.

In *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 328, it was said:

> The fact is not to be ignored that each of two or more corporations joining (under § 240) in a consolidated return is none the less a taxpayer. *Commissioner* v. *Ginsburg Co.*, 54 F. (2d) 238, 239. By the express terms of the statute (§ 240b) the tax when computed is to be assessed, in the absence of agreement to the contrary, upon the respective affiliated corporations "*on the basis of the net income properly assignable to each.*" "The term 'taxpayer' means any person subject to a tax imposed by this Act." Revenue Act of 1922, § 2a (9). A corporation does not cease to be such a person by affiliating with another. [Italics ours.]

The Supreme Court in the case last cited considered particularly the question as to the right of the Piedmont Company to deduct losses for a certain year, but it was said that its operations for that year having resulted in a loss there was nothing from which earlier losses could be deducted. It will be seen that this is in effect holding that losses, if deducted at all, must be deducted from the net income of the corporation sustaining the loss and where that company has no income for the particular year in question there can be no deduction. Such was the rule laid down in the *Swift & Company case*, which was cited with other cases as authority for the decision. Attention was called to the case of *National Slag Co.* v. *Commissioner*, 47 Fed. (2d) 846, as favoring a different view, but this case was by implication disapproved. Among the cases approving the decision in the *Swift & Company case* is *Commissioner* v. *Ben Ginsburg Co.*, 54 Fed. (2d) 238, where the court affirmed the doctrine

that "since each corporation of the affiliated group is a taxpayer, the net loss of each must be computed separately"; also that "the right of deduction of a net loss computed under section 206 is restricted to the computation of the net income of the taxpayer * * * and the deduction must be confined to the computation of the net income of the corporate entity."

No case submitted to this court was more carefully considered than the *Swift & Company case* which we are now asked to reverse. Upon reconsideration, its reasoning meets with our entire approval and it is generally considered that its conclusions have become established and settled law. We have considered the committee reports on the bill and find nothing therein to the contrary of the construction we have given the statute. Accordingly, we decline to reverse the case and adhere to its principles.

As before stated, it is argued that even if the *Swift & Company case* was correctly decided, when proper allocations of certain losses and income are made, the plaintiff will be entitled to recover. Stating more particularly the contentions of the plaintiff with reference to these matters, we find that they are as follows:

(1) That $2,488,441.69 of earnings of 1918 recorded on the books of the Cosmopolitan Shipping Company should be allocated to the Federal Export Corporation, the plaintiff, so as to increase plaintiff's income from $352,500.32 to $2,840,942.01;

(2) That advances by the Federal Export Corporation made in 1919 to the Commercial Iron & Steel Company and the Sligo Iron & Steel Company to meet their operating deficits should be considered losses of the Federal Export Corporation for 1919; and

(3) That certain advances made by the Cosmopolitan Shipping Company in 1919 to meet the operating deficit of the New Mexico Central Railway Company should be considered losses of the Cosmopolitan Shipping Company for 1919.

The facts that pertain to these matters are fully set forth in the findings and it is not necessary to again set them out in detail.

With reference to the first of these matters, the findings show that the Cosmopolitan Shipping Company, having a complete organization as a shipping company, had an agreement with plaintiff, as successor to the Federal Shipping Company, by which the charters of three boats for the carrying of cargoes between the United States and France were transferred to it and a commission was to be paid plaintiff of 5 per cent on the gross freight. The Cosmopolitan Shipping Company realized a net income in 1918 of $2,723,451.69 from the operation of the boats, which amount was included as a part of its income in the consolidated return filed for 1918, which was made up in accordance with the books of the two companies. The return also included a deduction taken by the Cosmopolitan Shipping Company of $680,-887.42 paid to the plaintiff as a commission in accordance with the agreement of the parties. The commission was included by plaintiff in its income for 1918 and both items allowed as returned.

The plaintiff says that the same persons acted as officials for both companies and argues that the books are not conclusive as to the nature of the transactions. That is sometimes true but here the two corporations acted as separate entities, kept separate books, made agreements with each other, and we think that the books show the facts as they really were, in accordance with which the plaintiff made a return to the Government. The allocation of income asked by the plaintiff must be denied.

In the second of the changes in allocation asked by the plaintiff it appears that plaintiff claims to be entitled to have the amounts advanced to the Commercial Iron & Steel Company and the Sligo Iron & Steel Company in 1919 charged as losses to it for that year. The stipulation of the parties made up from the books shows that in 1919 $470,-887.55 was lost by the Sligo Iron & Steel Company and $4,322.02 by the Commercial Iron & Steel Company. As these two companies had been operating at a loss in 1918, under the decision of the *Swift case*, their losses could not be taken as a deduction by the respective companies. Moreover these companies continued to exist after 1919 and there is nothing in the record from which a loss to the plaintiff in

1919 can be determined. On the contrary, so far as the evidence goes, it shows that these loans were not liquidated until later years. This change in allocation must be refused.

The third allocation contended for is to have the Cosmopolitan Shipping Company's net income for 1919 reduced by certain advances made to the New Mexico Central Railway Company in the amount of $201,984.35.

The evidence shows that the plaintiff and the Cosmopolitan Shipping Company advanced money to the railway company in 1919 and that the railway company was then being operated at a loss. The evidence shows that in 1926 or 1927 the stock of the New Mexico Company was sold to the A. T. & S. F. Ry. Co. but there is nothing in the record from which it can be determined when, if ever, it became evident that a loss was sustained by the Cosmopolitan Shipping Company and our conclusion is that a reallocation can not be made as asked by plaintiff.

In these matters plaintiff, long after the event and after its return had been made and audited and reaudited by the Commissioner in accordance with the books, and long after the decision in the *Swift & Company case*, attempts to pick out and have reallocated, in conflict with the bookkeeping records, these three items apparently in order to avoid the application of the rules laid down in the *Swift & Company case*.

It is argued that the cases of *Atlantic City Co.* v. *Commissioner*, 288 U. S. 152, and *Burnet* v. *Aluminum Goods Co.*, 287 U. S. 544, 548, sustain plaintiff's contention as to the deductibility of the losses in question, but the first named case turned on the mere question of whether there was affiliation and the court held that there was none. In the *Aluminum Co. case* there was a question with reference to the deductibility of a loss but the court said it was "conceded that the loss of respondent's advances to the Sales Company and the investment in its stock was sustained in 1917, [and] was deductible, therefore, if at all, in that year."

There is nothing in these decisions in conflict with the rule laid down in the *Swift case* nor are they authority for holding that a loss occasioned by an advance is deductible in the year in which the advancement was made when there

is no evidence showing that the loss was determined in that year.

The case of *Autocar Co.* v. *Commissioner*, 84 Fed. (2d) 772, is also relied upon but the facts present an entirely different case. It was one in which the manufacturer sold its product through four agencies each incorporated at nominal capitalization. The Circuit Court of Appeals held (following the dissenting opinion of the Board of Tax Appeals) that there was no real sale made by the manufacturer to the selling agencies and that the selling agencies did not in fact act as separate entities and corporations. Consequently this case has no application.

Our final conclusion is that the rules laid down in the decision of the *Swift & Company case* must stand and the plaintiff is not entitled to have the reallocation made which it requests.

It follows that plaintiff's petition must be dismissed, and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

THE WINCHESTER MANUFACTURING CO., A CORPORTATION, v. THE UNITED STATES

[No. 42518. Decided November 14, 1938. Plaintiff's motion for a new trial overruled March 6, 1939]

On the Proofs

Income and profits tax; amendment to claim for refund filed after time limit.—Where claim for refund filed May 9, 1930, was specific in confining its application to the labor content of certain materials included in the inventory as of December 31, 1918, and there was nothing in the claim which would call the attention of the court to a claim for revaluation of materials in the inventory generally, it is held that under the rule laid down by the Supreme Court in *Andrews* v. *United States* (302 U. S. 517), the plaintiff was not entitled to have considered an amendment filed March 30, 1933, after the period of limitations, seeking a refund on account of other and unrelated items.

Reporter's Statement of the Case

Income and profits tax; valuation of inventory.—**Where claim was made for refund for failure to include as part of inventory, as items subject to be valued under the statute and regulations at "cost or market, whichever is lower," (a) small production tools and materials used in their manufacture and (b) supply and other miscellaneous items, consisting largely of factory stationery, it is held that since none of these articles were on hand for sale and did not become part of the finished product which plaintiff was manufacturing for sale, the cost of these articles was an item of expense and not a part of the inventory.**

Same.—The omission of any allowance on account of the labor element in these items was not an error.

The Reporter's statement of the case:

Mr. Claude E. Koss for the plaintiff. *Messrs. H. Stanley Hinrichs* and *Oscar P. Mast* were on the briefs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson, Fred K. Dyar* and *G. W. Billings* were on the briefs.

The court made special findings of fact as follows:

1. Plaintiff is a Connecticut corporation which was organized July 7, 1865, under the name of Winchester Repeating Arms Co. Its name was changed February 21, 1929, to The Winchester Manufacturing Co. During 1918 plaintiff was engaged in the manufacture of arms, ammunition, and related articles and had contracts with the Government and other parties for the production of these articles. It kept its books and rendered its returns on the accrual basis and used inventories as a factor in determining net income.

2. Plaintiff duly filed its income and profits tax return for the calendar year 1918 and paid the tax shown due. In that return plaintiff computed the value of such inventories on the basis of "cost or market, whichever is lower." On that basis plaintiff showed an inventory at December 31, 1918, of $12,165,555.87, whereas the book value (cost) of that inventory as of that date was $13,355,728.71. The difference represented a reduction by plaintiff from cost to

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market and resulted in a decrease of taxable income for 1918 in the amount of the difference, that is, $1,190,172.84.

3. While plaintiff's return for 1918 was being audited by the Commissioner of Internal Revenue and when the statute of limitations was about to run on any overpayments that might be determined for that year, plaintiff on March 15, 1924, filed a claim for refund of $500,000 for 1918 and assigned the following basis therefor:

> The company's tax situation is under consideration at Washington and from evidence which is being submitted by the company in connection with certain proposed additional taxes, it appears that the company will be entitled to a refund and in order to absolutely protect its rights and interests under the statute of limitations. this refund claim is hereby filed.

4. After an audit of plaintiff's return for 1918 the Commissioner on July 14, 1926, advised plaintiff of his determination of a deficiency for 1918 of $870,399.45. In arriving at that deficiency the Commissioner made various adjustments to income and invested capital, including an adjustment on account of the pricing of its inventories at cost or market, whichever was lower. As heretofore shown in finding 2, plaintiff had claimed in its original return that its inventory at December 31, 1918, and likewise its income for the calendar year 1918, should be reduced in the amount of $1,190,-172.84 in order to reflect a reduction from cost to market in its closing inventory for 1918. Upon his consideration of the inventory item the Commissioner determined that the amount of the reduction should be $494,992.22 instead of $1,190,172.84 as used by plaintiff. The amount thus allowed was based upon a redetermination by the Commissioner of the market value at December 31, 1918, of materials included in that inventory.

5. During February 1927, the Commissioner assessed the deficiency of $870,399.45 referred to in finding 4, with interest of $32,896.32, a total of $903,295.77. That assessment was abated to the extent of $4,769.97 on April 12, 1927, and a part of the remainder, $126,773.62, was satisfied on March 12, 1927, by the application of an overpayment of income

and profits taxes for 1919, and the balance, $771,752.18, was paid April 30, 1927.

In connection with the determination and assessment of that deficiency the Commissioner on March 7, 1927, rejected the claim for refund referred to in finding 3, for the reason that the audit of the return had disclosed a tax liability in excess of the amount assessed.

6. May 9, 1930, plaintiff filed a second claim for refund for 1918 in the amount of $500,000 on the following ground:

> The Company claims that in computing the inventory of December 31, 1918, at market effect should be given to a reduction in wages which took place shortly prior to December 31, 1918. The details are set forth in the attached papers. A hearing is requested in case adverse action is considered on this claim.

The claim was executed April 22, 1930. The papers attached, to which reference was made, set out certain orders which were issued effecting a reduction of labor rates at or about the termination of the war and included a schedule showing a claimed reduction in inventory on account of the labor content of manufactured inventories, of $471,026.17. No reference was made in that claim to any reduction in inventories other than on account of a decrease which resulted from the labor which entered into the manufactured inventories.

7. After consideration of the claim of May 9, 1930, the Commissioner on October 5, 1931, issued a certificate of overassessment in which the claim was allowed in the amount of $199,698.53 plus interest theretofore assessed of $6,438.63 and interest from date of payment to October 10, 1931, of $53,951.49. The amount so determined was duly refunded to plaintiff or satisfied and is not involved in this controversy.

In determining the amount of that overpayment based on the claim for refund, the Commissioner allowed a "reduction of inventory based on reduction in labor" of $240,-352.27 and made no change in the reduction of the inventory based on price reductions in material theretofore allowed by him. The labor reduction allowed applied to commercial contracts and did not include materials acquired for the

production of war supplies under Government contracts, for the reason that the Commissioner had taken the position that such supplies on hand at the end of 1918 were not subject to adjustment to market since a settlement was effected in a later year on account of such war contracts which was intended to compensate plaintiff for any decline in the market price of such material. However, on February 15, 1932, the Supreme Court held in *United States Cartridge Co.* v. *United States*, 284 U. S. 511, that such war materials could be inventoried in the same manner as other materials on hand at December 31, 1918. After that decision had been rendered, plaintiff on March 10, 1932, requested the Commissioner to extend his adjustments to include Government contracts, such request reading as follows:

> Just at the close of 1931 in association with Mr. Claude E. Koss, of #11 Broadway, New York City, we secured a refund for the Winchester Manufacturing Company (formerly Winchester Repeating Arms Company) based upon a reduction of the inventory at the end of 1918 due to taking the labor cost at market instead of at cost as originally determined by the Commissioner in arriving at the tax for the year 1918.
>
> In the determination of this refund the amount really due us was reduced by the disallowance of any reduction to market of the labor due to the fact that no allowance was made for reduction of labor value on certain Government contracts.
>
> An identical situation arose in the case of the *United States Cartridge Company, Petitioner*, v. *The United States*, in which the Supreme Court of the United States on February 15th handed down its decision which I am enclosing to you under cover herewith.
>
> You will note that the Supreme Court of the United States holds that the Commissioner and the Court of Claims were in error in not for 1918 allowing petitioner to take materials on hand for Government contracts at market value rather than at the amounts subsequently realized in settlements with the contractor by the United States.
>
> If this decision of the Supreme Court is to be followed, then, of course, the Winchester Manufacturing Company is entitled to the additional refund.

> I have to ask that our claim may be reopened and the case sent to the Unit for the computation of the correct tax due following the ruling of the Supreme Court of the United States sent you herewith.

Shortly thereafter plaintiff filed an affidavit, with schedules attached, in support of its request of March 10, 1932, and those schedules set out in detail revaluations of both material and labor at December 31, 1918.

8. March 30, 1933, plaintiff filed a document entitled "Amended Claim for Refund," in which it asked for the refund of $500,000 for 1918 and sought to have the claim filed May 9, 1930, extended in so far as it related to a revaluation of its inventory as at December 31, 1918, to include a revaluation of all elements entering into the inventory, including labor, material, and supplies. The specific grounds of the so-called amended claim were as follows:

> The Company claims that in computing its inventory at December 31st, 1918, the Bureau of Internal Revenue should, under the tax law, value all of the elements entering into the inventory, including labor, material, and supplies at cost or market, whichever was lower, and that it should give effect to the reduced market values existing for each item at December 31st, 1918. The labor, material, and supplies in the Government contracts in the inventories should also be adjusted at December 31st, 1918, to the basis of cost or market, whichever is lower. The Company filed a claim dated April 22nd, 1930, several parts of which are still under consideration by the Bureau of Internal Revenue, and the claimant contends that such claim fully covers the matters which are now set forth in this claim. In order that there be no doubt about the matter, and for the purpose of fully protecting the interests of the taxpayer, this amended claim is now filed under the decision of the Supreme Court of March 15, 1933, in *Bemis Bro. Bag Co.* v. *U. S.*; *U. S.* v. *Factors & Finance Co.*, and *U. S.* v. *Memphis Cotton Oil Co.*, all in Vol. 53, Sup. Ct. Rep.

9. On or about September 26, 1933, the Commissioner issued a certificate of overassessment for $8,849.28, and on or about November 10, 1933, that amount was refunded to

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plaintiff, together with interest in the amount of $3,441.88. In determining the overassessment referred to above, the only change by the Commissioner in plaintiff's net income was a reduction in net income of $10,403.25 on account of labor involved in government contracts, which was explained as follows:

> In accordance with the decision of the U. S. Supreme Court in the case of the U. S. Cartridge Company, a reduction to market value of inventories in fixed price government contracts is allowable. An adjustment has therefore been made for labor in such contracts included in your inventory, which labor was excluded in the computation of the overassessment previously scheduled.

10. This suit was filed on September 29, 1933, and was based on the second claim for refund filed May 9, 1930, seeking a reduction from "cost" to "cost or market, whichever is lower" of the labor content in the inventory on hand for commercial contracts, and the so-called amended claim filed March 30, 1933, seeking a reduction from "cost" to "cost or market, whichever is lower" of all the elements entering into the inventory for commercial and government contracts, including labor, material and supplies. The claim for reduction from "cost" to "cost or market, whichever is lower" of the labor content in inventories on hand for government contracts has been satisfied by the refund made in the certificate of overassessment in the amount of $8,849.28 (see finding 9), and further claim therefor is now waived by the plaintiff and this item of the suit abandoned.

There is nothing in the evidence to show that when the Commissioner was considering the claim for refund of May 9, 1930, he was apprised that any claim for revaluation of material as distinguished from the labor content of material was made until the amendment of March 30, 1933, was filed. Nor is there any evidence to show that the Commissioner did in fact under the claim of May 9, 1930, make any audit beyond that which was necessary to determine the labor content in certain portions of the material contained in the inventory. The evidence as a whole shows that no consideration

was given by the Commissioner to the claim of March 30, 1933, and that the application for reopening plaintiff's case under this amendment was denied.

11. The parties agree that the present suit is based on the following claims:

(a) That in computing the December 31, 1918, inventory all of the following items carried in the inventory should be priced on the "cost or market, whichever is lower" basis. These items are:

MATERIALS

Manufactured Parts and Supplies: Finished gun tools and cartridge tools	$18, 263. 82
Miscellaneous tools, cast iron parts, machine parts, machines and parts	11, 239. 17
Wood boxes, paper boxes, and labels for cartridges and wood cases and gun packing cases and stationery	988. 07
Tool steel blanks and tools in process	12, 719. 84
Miscellaneous Stores:	
Salvage stores	17, 400. 21
Balbach smelting stores	2, 799. 44
Stores in transit	54, 350. 67
Uninspected stores	82, 478. 19
Indirect Material:	
Fuel, except coal	1, 563. 62
Oils and liquids	5, 752. 22
Builders' hardware	4, 016. 15
Direct Material:	
Pipe supplies, electrical supplies, miscellaneous brass, bronze, and copper, and miscellaneous cartridge stores	18, 512. 32
Total	230, 083. 72
Material in Government contracts	93, 765. 19
Total of specific reductions of materials claimed	$323,848.91

(b) That the labor content in all the inventory items acquired for other than Government contracts should be adjusted from "cost" to "cost or market, whichever is lower," by applying the same average percentage as was applied by the Commissioner in his allowance for labor reduction on certain of the items permitted to remain in the inventory

and with respect to which the original claim was allowed in part. The items for labor claimed are as follows:

Labor in stationery, cartridge labels, packing cases, paper boxes, gun packing cases, and other wooden cases	$94, 383. 84	
Labor in tool steel blanks and tools in process	336, 840. 09	
Labor in finished miscellaneous tools, cast iron parts, machine and machine parts	277, 638. 42	
Total of labor items in Inventory	$708, 862. 35	
Reduction claimed (8.53% of above)		$60, 465. 96
Grand total of specific reductions to be covered in suit		$384, 314. 87

(c) In addition, plaintiff claims adjustment from "cost" to "cost or market, whichever is lower" on certain miscellaneous items which were eliminated from the inventory by the Commissioner on the ground that they were unaccounted for, or, being accounted for, on the ground that there was no evidence as to the market value thereof.

12. By eliminating the materials allocated to contracts completed after December 31, 1918, the amount involved in the claim for adjustment in the material items allocated to Government contracts is now reduced from $93,765.19 to $66,798.67. Of this amount, $7,712.71 represents adjustment claimed on materials allocated to cost plus contracts. All of the material upon which this claim is based, except as to a few minor items, is such that it may reasonably be presumed that it would become a physical part of the product hereinafter referred to as Class 1 items.

13. In the amount sued for, claimed on materials allocated to commercial contracts totaling $230,083.72 (finding 11 (a)), there are included classified items totaling $54,542.89, upon which adjustments from cost to market were disallowed by the Commissioner in his final determination on the deductions taken on the return, on the ground they were supply items not subject to the "cost or market, whichever is lower" basis, and items totaling $175,540.83, on the ground that an arbitrary percentage basis was used in reducing the book cost to "cost or market, whichever is lower."

14. All of the items appearing in the inventory upon which adjustment to "cost" or "cost or market, whichever is lower" is claimed may be classified as follows:

Class 1. Items of material which become a physical part of the manufactured product.

Class 2. Items in the nature of consumable supplies which are used in productive processes and indirectly become a part of the manufactured product.

Class 3. Finished production tools and tools in process, including materials for making same, the life of which is indeterminable.

Class 4. Miscellaneous small production tools and materials used for making the same, the life of which may reasonably be presumed to be less than one year.

Class 5. Capital asset items, replacement and maintenance parts therefor, and materials for making same.

Class 6. Supply and other miscellaneous items not allocable to any of the foregoing classifications.

Class 7. Salvage items of direct materials, such as copper, brass, etc.

Class 8. Unidentified items impossible of practical classification.

15. Included in the items totaling $54,542.89, referred to in finding 13, are items of the following classifications:

Class 1	$668.59
" 2	7,315.84
" 4	36,042.53
" 5	10,196.45
" 6	319.48
Total	$54,542.89

16. Included in the items totaling $175,540.83 (finding 13) are items of the following classifications:

Class 1	$4,355.70
" 5	14,156.62
" 7	20,199.65
" 8	54,350.67
Uninspected stores	82,478.19
Total	$175,540.83

The breakdown of "Uninspected Stores" has been reduced by a reclassification by plaintiff to $79,694.44 and the total of these items to $172,757.08.

17. Included in the item "Uninspected Stores" are materials which, according to the nomenclature of the several entries, fall into classes 1, 2, 3, 4, 5, 6, and 8 (finding 14), in the following amounts, respectively:

Class 1	$49,625.87
" 2	920.49
" 3	1,497.45
" 4	556.80
" 5	1,337.09
" 6	115.62
" 8	25,641.12
Total	$79,694.44

as to classes after adjustment for non-bonus periods, the inventory falling in classes 1, 3, 4, 5, and 6. Items falling in classes 3, 4, and 5 represent items disallowed on the ground the cost of items produced could not be segregated from cost of items purchased. Items falling in classes 1 and 6 represent items eliminated from the inventory on the ground they were not such as under the law and regulations could be priced at "cost or market, whichever is lower." The total reductions originally claimed in the petition were $60,465.96, but have been reduced to $37,224.33. Segregated as to classes after adjustment for non-bonus periods, the items are as follows:

Class 1	$4,086.68
" 3	21,218.12
" 4	3,820.59
" 5	6,755.56
" 6	1,343.38
Total	$37,224.33

19. In addition to the claims based on classified material and labor items, a blanket claim is made for adjustment from cost to market of unaccounted-for inventory amounting to $47,724.80, and certain other items upon which no reduction was allowed by the Commissioner of Internal Revenue because of lack of evidence as to the market value.

Opinion of the Court

The unaccounted-for inventory claim represents the difference between the cost ledger total for the several items and the total for which substantiating vouchers are available. This claim was disallowed by the Commissioner on the ground that no substantiating vouchers were available in 1925 when the revenue auditor examined the books. The difference between the cost ledger total in the several accounts and the total of substantiating vouchers available may be classified as follows:

Class 1	$6,248.03
" 2	1,388.93
" 3	5,544.35
" 4	28,979.07
" 5	5,564.42
Total	$47,724.80

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit to recover a portion of income and profits taxes paid for the year 1918. Several refunds have been made and so far as the refund involved in this case is concerned, it is based on the ground that the Commissioner of Internal Revenue placed a wrong value upon certain items of plaintiff's closing inventory for that year. The principal defense set up by defendant raises the issue that no claim for the refund now sought to be recovered was filed in time to permit the plaintiff to avail itself of the inventory adjustment which it now seeks to have made.

It appears that in filing its return for 1918 plaintiff, in making its inventory, followed the rule of "cost or market, whichever is lower" and, since market was lower than cost, at least for many items in its inventory, claimed a decrease in taxable income for 1918 of $1,190,172.84 on the ground that the market value of its inventory at December 31, 1918, was that much less than cost. On an audit of this return, the Commissioner reduced the inventory reduction claimed of $1,190,172.84 to $494,992.22, such inventory allowance being based upon a revaluation of materials entering into plaintiff's inventory. After making this reduction in the

allowance claimed, together with other adjustments not here material, the Commissioner assessed a deficiency of $870,-399.45 with interest, in February 1927. A portion of that deficiency was satisfied by abatement and credit, and the balance, $771,752.18, was paid by plaintiff April 30, 1927. In order to protect itself against the statute of limitations on any overpayment that might be determined, the plaintiff filed a claim for refund on March 15, 1924. A deficiency instead of an overpayment having been found by the Commissioner, this claim was rejected and is not material in this proceeding.

About three years later, on May 9, 1930, plaintiff filed a second claim for refund for 1918 on the ground that "in computing the inventory of December 31, 1918, at market, effect should be given to a reduction in wages which took place shortly prior to December 31, 1918." That claim set out in great detail the situation with reference to labor and wages existing at December 31, 1918, and the manner in which the general reduction in labor costs would affect the closing inventory for 1918. It was based solely on the costs of labor and made no reference whatever to any further adjustment desired on account of the material content of the inventory.

The Commissioner considered this claim and on October 5, 1931, issued a certificate of overassessment for $199,698.53. The allowance of this overassessment was made by reason of the decrease in the closing inventory for 1918 of $240,-352.27 and the decrease was based on a reduction in the value of the labor content of the inventory. There was no reduction made at this time on account of revaluation of material, nor did the labor reduction include a revaluation of the inventory on hand in connection with Government contracts, the Commissioner having taken the position that any loss on account of a decline in value of such material had been adjusted subsequent to 1918 through settlements on Government contracts. However, the Supreme Court on February 15, 1932, held in *United States Cartridge Co. v. United States*, 284 U. S. 511, that these war materials could be inventoried in the same manner as other

materials on hand at December 31, 1918. Accordingly, on March 10, 1932, plaintiff requested reconsideration of the action taken on the claim of May 9, 1930. This reconsideration was granted and the Commissioner made a further reduction in plaintiff's inventory as of date December 31, 1918, of $10,403.25 on account of labor involved in Government contracts, and on September 26, 1933, issued a certificate of overassessment for $8,849.28 by reason of this reduction. In the meantime and before the Commissioner had taken the action just referred to, plaintiff, on March 30, 1933, filed a document designated "Amended Claim for Refund" in which it requested in effect that the Commissioner extend his consideration under the claim for refund of May 9, 1930, so as to include not only labor but certain items of material entering into the inventory of December 31, 1918, and make an adjustment therefor. The Commissioner refused to recognize the document filed March 30, 1933, as an appropriate amendment to the claim of May 9, 1930, and accordingly made no adjustment or reduction in the assessment under that claim other than on account of the ground stated in the original claim, namely, a decrease in the inventory due to a reduction in the cost of labor. The claim of May 9, 1930, and the amendment thereto filed March 30, 1933, are now the only claims in controversy between the parties and form the basis of plaintiff's action.

It has already been shown that the claim filed May 9, 1930, was confined to the labor content of inventory items. The plaintiff, however, contends that the Commissioner was fully apprised by other documents that it was intended to apply to the value of materials included in the inventory generally and that the valuation of the materials was reconsidered by an audit made on this claim. But, as before stated, the adjustment was asked wholly on account of a change in labor costs and the five supporting documents and schedules dealt with the same subject with particularity without any suggestion that a revaluation of the material element was desired. The basis of the amendment to the claim filed March 30, 1933, was that the Commissioner im-

Opinion of the Court

properly valued certain items in its closing inventory for 1918 and the plaintiff contends that the claim last filed, when considered in connection with the claim of May 9, 1930, other requests filed, and certain acts of the parties, is sufficient to permit the revaluation of both material and labor elements properly entering into a valuation of such items, notwithstanding the fact that the last claim for refund had been filed after the expiration of the statute of limitations (40 Stat. 1057, 1085).

In the case of *Curran Printing Co.* v. *United States*, 83 C. Cls. 431 (certiorari denied, 301 U. S. 686), it appeared that an audit made by the Commissioner pursuant to a claim filed in time disclosed facts sustaining the right of the plaintiff to recover and this court held that the plaintiff, before a ruling was made thereon, might file an amendment to the refund claim setting up the matters disclosed by the Commissioner's audit although the last claim was not filed until after the expiration of the statute of limitations. In the case of *Mabel S. Andrews, Exec.*, v. *United States*, 84 C. Cls. 460, relying upon the cases of *Youngstown Sheet & Tube Co.* v. *United States*, 79 C. Cls. 683, and *Curran Printing Co.*, *supra*, upon somewhat similar facts, a similar ruling was made. The *Andrews case*, however, was reversed by the Supreme Court, 302 U. S. 517, and while the closing paragraph of the court's opinion thereon still leaves open a question as to circumstances under which an amendment might be made after the running of the statute if the Commissioner was fully apprised of the items of deduction ultimately claimed in the amendment by his audit, the decision is explicit in holding that a claim limited to a specific item can not "be amended out of time to seek a refund on account of other and unrelated items."

It is contended on behalf of plaintiff that the Commissioner was fully apprised of a claim for refund on account of overvaluation of material before the last claim for refund was filed. Plaintiff's counsel support this contention by reference to a claims card bearing date 4/3/33, but this card merely shows that a request for reopening the claim had been denied; moreover the date on the card was after the expiration of the statute of limitations. We find nothing

in the evidence to show that material, as distinguished from the labor content in material, was considered by the Commissioner in the audit of the claim of May 9, 1930, or that the Commissioner had considered such material under this claim at the time when the amendment to the claim was filed on March 30, 1933. On all of the evidence it is apparent that the attention of the Commissioner was not called to this matter until after the statute of limitations had run. Moreover, there is no evidence whatever that the Commissioner did in fact make any audit beyond that which was necessary to find the labor content in certain portions of the material contained in the inventory, and that the application for reopening was denied. The records of the Commissioner's office show plaintiff's case was not reopened under the amendment of March 30, 1933, and the evidence as a whole shows that no consideration whatever was given by the Commissioner to that document.

As already stated, the claim for refund filed May 9, 1930, was as specific as it was possible to make it in confining its application to the labor content of certain materials included in the inventory. There was nothing in it which would call the attention of the court to a claim for a revaluation of materials in the inventory generally. Under the circumstances, we are constrained to apply the rule laid down in the *Andrews case* and hold that the plaintiff was not entitled to have considered an amendment filed after the period of limitations seeking a refund on account of other and unrelated items.

What is said above disposes of the main branch of the case but there are other contentions made on behalf of the plaintiff. The special findings show the various items contended for by plaintiff, as set forth in a stipulation of the parties, together with the correct amount pertaining to each item and the classification of the items in eight different classes. These classes are set out in Finding 14, and Finding 18 shows that in only five of the eight classes is labor involved; namely, classes 1, 3, 4, 5, and 6. Consequently classes 2, 7, and 8 are eliminated from further consideration. In addition to these classes it is conceded on behalf of the plaintiff that it must fail for lack of proof with re-

spect to classes 3 and 5. On the other hand, defendant concedes that to the extent the court finds the claim sufficient to cover the items included in class 1, plaintiff is entitled to recover. The revaluation sought in that class includes not only labor but also material. Nothing can be allowed on the part of the claim for material but the parties have agreed that under this item a labor reduction should be made in the sum of $4,086.68.

There remain for consideration only the items which are covered by classes 4 and 6. Here a new question arises; namely, whether the items included in those two classes are properly to be considered inventory items which are subject to be valued under the statute and regulations at "cost or market, whichever is lower." Class 4 is described as "Miscellaneous small production tools and materials used for making the same, the life of which may reasonably be presumed to be less than one year"; and class 6 refers to "Supply and other miscellaneous items not allocable to any of the foregoing classifications." The small tools included in class 4 which had a life of less than one year, as well as the material on hand for their production, and the supply and other miscellaneous items of class 6 which the record shows consisted largely of factory stationery, did not belong in the inventory. None of these items were articles on hand for sale; neither did they become part of the finished products which plaintiff was manufacturing for sale. The cost of these articles we think was an item of expense for which allowance may be made but not as a part of the inventory. The omission of any allowance on account of the labor element in these items was not an error.

Under the rules we have laid down above, recovery can be had only on account of the reduction in net income brought about by the revaluation of the labor element in class 1, the amount of which is agreed to be $4,086.68. This reduction being allowed, we find there was an overpayment of $3,-476.24 (including interest collected in connection with the deficiency) for which judgment will be entered with interest as provided by law. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

Per Curiam

ON MOTION FOR NEW TRIAL

PER CURIAM: The motion for new trial is based upon alleged errors in the findings of fact. Particular stress is laid upon a letter sent to the Commissioner dated March 10, 1932, quoted in Finding 7 as showing that the plaintiff claimed a reduction in the value of the material content of its inventory. To avoid any misunderstanding of the letter, it may be well to explain clearly to what it referred. The letter did make a claim on account of materials, but as said therein, it was materials on hand "*for Government contracts at market value.*" [Italics ours.] The letter stated that it was based on the decision of the Supreme Court in the *United States Cartridge Company case* [284 U. S. 511] which referred only to materials for Government contracts and not to any other material. Plaintiff's claim for further allowance in this respect was considered and allowed by the Commissioner and, as shown in the opinion, in the final conclusion, a certificate of overassessment for $8,849.28 was issued by reason of the reduction in the inventory in accordance with the Cartridge Company decision. There is nothing in the letter which would apprise the Commissioner that a reconsideration of materials generally was being requested.

The court further found that the evidence as a whole shows that no consideration was given by the Commissioner to the claim of March 30, 1933. This finding is said to be erroneous and reference is made to a "claims control card" to support this contention. This card is a part of the "evidence as a whole" considered by the court in making its ultimate finding, but the control card instead of showing that the finding was erroneous supports the conclusion of the court by the notation thereon "canceled 9/28/33" and the further notation "request for reopening denied." It is true that this amended claim was sent to the Audit Division and to the Audit Review Division but the filing of a claim or its reference to some particular division does not show that it was considered. A reexamination of the evidence on this point only serves to confirm our former conclusion.

One other matter possibly should be noticed. It may be conceded that the Commissioner in reaching his conclusions with reference to the cost of labor must to some extent consider the materials upon which the labor was expended but the cost or market value of materials is not fixed by the labor content of such materials and must be considered as a separate item. It is obvious that an audit of the cost of the labor would not include an audit of the cost or market value of the materials, and the opinion shows that the claim of May 9, 1930, was confined with great particularity to the cost of labor.

The motion for new trial must be overruled. It is so ordered.

(Note—Plaintiff's second motion for new trial overruled May 29, 1939.)

GEORGE FRANCIS MYERS v. THE UNITED STATES

[No. C-700. Decided December 5, 1938]

On the Proofs

Patent for flying machine; validity.—From the prior art and the knowledge set forth in the findings of fact it is held that the claims of plaintiff are not directed to novel and patentable subject matter and are therefore not valid.

Continuity of invention.—The question of continuity of invention as applied to applications for patents filed upon different dates to entitle one to priority is one of fact.

The Reporter's statement of the case:

Mr. Max D. Ordmann for the plaintiff. *Mr. Edward Raff* was on the briefs.

Mr. Thomas B. Booth, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. J. F. Mothershead* was on the briefs.

The court made special findings of fact as follows:

1. The patent in suit no. 1226985 was granted to the plaintiff, George Francis Myers, May 22, 1917, on an application filed in the United States Patent Office September 20, 1905.

serial no. 279281. A copy of this patent, plaintiff's exhibit 5, is by reference made a part of this finding.

2. The following is a summary of the title to the patent in suit:

(a) Under date of *October 17, 1917*, a written memorandum of agreement was entered into between plaintiff and one William A. Lewis, providing for the formation by Lewis of a corporation. The memorandum further provided that plaintiff, on request by Lewis and subject to certain conditions, would grant to Lewis, or said corporation, an exclusive and perpetual license for the use of patent no. 1226985 and the machines, mechanisms, and machinery therein provided for. This memorandum of agreement was recorded in the United States Patent Office February 20, 1918.

(b) On *January 5, 1918*, the plaintiff, by a written assignment, assigned to one John C. Pennie his entire right, title, and interest in letters patent no. 1226985, subject to the condition that the title thereto should revert to plaintiff if on or before March 5, 1918, plaintiff should repay to Pennie the sum of $100, with interest. This assignment was recorded in the United States Patent Office March 5, 1918.

(c) On *February 20, 1918*, a written agreement was entered into between the aforesaid William A. Lewis and Myers Aircraft Corporation reciting the aforesaid memorandum of agreement of October 17, 1917, between Lewis and plaintiff and the subsequent formation, under the laws of the State of Delaware, of the corporation—Myers Aircraft Corporation—provided for in the memorandum of agreement. Under this agreement of February 20, 1918, Lewis, for certain considerations, assigned to Myers Aircraft Corporation all rights acquired by him from plaintiff, including the right to procure from plaintiff an exclusive and perpetual license under patent no. 1226985. This agreement provided for the issuance of stock and also a money payment to be made to Lewis within six months. On failure of the latter condition the license granted by plaintiff should revert to Lewis, the retransfer of such license to be made by one Frederick T. Frelinghuysen named

to act on behalf of the Corporation. This agreement was recorded in the United States Patent Office April 12, 1918.

(d) On *February 25, 1918*, a written agreement of license was entered into between plaintiff and Myers Aircraft Corporation, under which plaintiff granted to that corporation, for certain named considerations, under patent no. 1226985, a free, exclusive, and perpetual license, the corporation agreeing to prosecute and defend all actions in law or in equity relating to or for infringement of said patent and to collect and maintain suits therefor for all royalties or emoluments from any person or persons, firms, partnerships, corporations, or governments that may infringe the patent. This agreement of License was recorded in the United States Patent Office April 12, 1918.

(e) On *April 8, 1918*, Myers Aircraft Corporation appointed Frederick T. Frelinghuysen to act for it in the execution and delivery to Lewis of a conveyance of the exclusive license granted by plaintiff under the agreement of February 25, 1918, when and if the conditions provided for in the agreement of February 20, 1918, should arise.

(f) On *September 29, 1919*, a written assignment was made by the aforesaid John C. Pennie to plaintiff of all interest vested in Pennie by reason of the aforesaid assignment of January 5, 1918, in consideration of the sum of $110.40, this being the principal and interest provided for in the assignment of January 5, 1918, the reassignment reciting that up to September 29, 1919, such principal and interest had not been paid. This assignment was recorded in the United States Patent Office October 18, 1919.

(g) On *October 1, 1919*, plaintiff and the Myers Aircraft Corporation entered into a written agreement in substitution for and cancelling the aforesaid agreement of license of February 25, 1918. Under this substitute agreement of October 1, 1919, plaintiff, for certain stated considerations, granted to Myers Aircraft Corporation the entire right, title and interest in and to certain patents and applications for patent named in an annexed schedule, which included patent no. 1226985, together with outstanding licenses there-

under, and agreed to execute concurrently a separate assignment to convey complete title in the scheduled patents and applications to Myers Aircraft Corporation. The agreement further provided that the Myers Aircraft Corporation should execute an undated reassignment to plaintiff of scheduled patents and applications, the reassignment to be placed in escrow subject to a stated trust and to be subsequently dated and delivered to plaintiff by the trustee in the event of certain named conditions. In the event of reassignment by the corporation to plaintiff of the scheduled patents and applications the agreement further provided that the corporation should have a perpetual license under said patents and applications. This agreement was recorded in the United States Patent Office October 30, 1919.

(h) On *October 1, 1919*, concurrently with the date of the last preceding agreement and pursuant thereto, plaintiff executed a written assignment under which he assigned to the Myers Aircraft Corporation all his entire right, title, and interest in and to all the applications and patents set forth in an annexed schedule, similar to the schedule annexed to the last preceding agreement, which schedule included patent no. 1226985, and further assigned to the corporation all legal and equitable claims for past infringement. This assignment was recorded in the United States Patent Office October 23, 1919.

(i) On *August 30, 1922*, a written reassignment agreement was made by Myers Aircraft Corporation assigning to plaintiff all its right, title, and interest in and to the patents and applications set forth in the schedule annexed to the aforesaid agreement of October 1, 1919, and to the assignment of the same date, including patent no. 1226985, together with all legal and equitable claims for past infringement, the reassignment agreement reciting that the conditions for reassignment set forth in the preceding agreement of October 1, 1919, had been fulfilled. This reassignment agreement was executed October 20, 1919, as an undated assignment and placed in escrow in the hands of a trustee, under the trust named in the agreement of October 1, 1919,

and pursuant to the agreement and trust, following sixty days' notice by plaintiff, was dated by the trustee and delivered to plaintiff as of August 30, 1922. This reassignment agreement was recorded in the United States Patent Office May 14, 1923.

3. A flying machine inherently comprises three basic elements or mechanisms classified as follows:

(a) A mechanism capable of exerting lift, which in the case of a dirigible or balloon is typified by a container filled with a gaseous medium such as hydrogen, helium, or hot air, and which is typified in a case of an airplane by a surface or surfaces such as a wing capable of exerting a lift when the same is propelled through the air at a suitable angle.

(b) Propelling means which in general are typified by internal combustion engines operating a propeller or propellers which exert a forward thrust.

(c) A control mechanism which in general is capable of controlling the equilibrium of the flying machine or controlling its attitude about the three rectangular axes of the machine.

These three mechanisms, (a) lifting means, (b) propulsion means, and (c) controlling means, as herein set forth and which are directly involved in the issues presented, will be referred to in this order in the consideration of the patent in suit, the alleged infringing structures and the prior art.

4. As shown in figures 1 and 3 of the patent in suit as issued and illustrated on page 6, the structure of the patent in suit comprises a set of lifting surfaces comprising a series of annular rings of varying diameters. These annular lifting surfaces are described as preferably having the inner diameter of any lifting surface coinciding with the outer diameter of the next lower annular lifting surface. These surfaces are rigidly connected together by means of a lattice-like bracing structure (d), and a car or platform for the operator is suspended from the lifting surfaces by means of suitable suspending rods.

Located below these surfaces is a bowl-shaped plane j. The patent fails to disclose any covering for the top of the

bowl-shaped airplane further than to state (page 2, lines 44–50) that a balloon may be used to start the machine which when collapsed may be held and nested inside the bowl-shaped plane. This requires that the top of the bowl-shaped plane should be open in whole or in part. The balloon is not shown in the drawing or elsewhere referred to in the specification.

As disclosed, the propulsion of the machine is effected by means of two internal combustion engines, one located on either side of the car or platform, each one of which is suitably coupled to a propeller adapted to obtain a forward thrust. The specification states that these two propellers may be coupled to their shafts simultaneously so as to drive the machine forward, or by operating one of the propellers and not the other the machine can be steered to the right and left, or the same may be accomplished by driving one of the engines faster than the other.

The lateral control mechanism comprises two rudders, v–4, which when manipulated by suitable cords also function to steer the machine to the right or left.

The equilibrium or attitude controls comprise three horizontal propeller blades, f–1, f–13, and f–14, which are mounted to rotate on vertical axes, two being located in the rear of the machine and one in the front. These propellers which are referred to in the claims in suit as "stabilizers" are intended to be rotated by power received from the engines by means of belts, pulleys, and clutches. If it is intended to lift the front of the machine, the clutch operating the front propeller, f–14, is operated causing this propeller alone to exert a lifting force and thus tilt the machine upwardly. If it is desired to alter the attitude of the machine about the flight axes, either one or the other of the rear propellers, f–1, f–13, will likewise cause to rotate through actuation of their respective clutch controls.

The patent states that the two rear lifting screws may also be used conjointly to shift the machine to a higher or lower level.

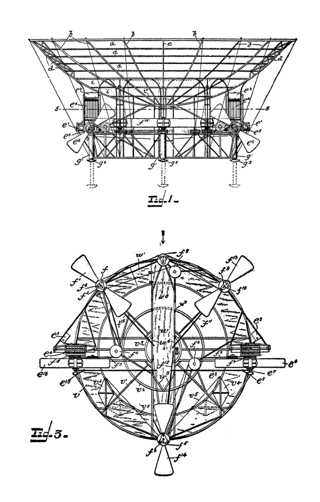


Fig. 1.
Fig. 3.

5. The claims in the patent in suit are as follows:

2. A flying machine comprising a car, an aeroplane normally inclined to the horizontal, a plurality of stabilizers mounted one on each side of the said car and normally out of action, means for placing the said stabilizers in action, and direct connections comprising a cord between the said stabilizers whereby the same may be operated simultaneously.

3. A flying machine comprising a car, an aeroplane with a free periphery normally inclined to the horizontal and extending outwardly on each side of the longitudinal center line of the said car, a second aeroplane also extending outwardly on each side of the said center line and vertically disposed to the said first mentioned aeroplane, a plurality of openly spaced uprights connecting the said aeroplanes, a plurality of stabilizers normally out of action mounted on axes substantially transverse to the line of flight one on each side of the said center line with substantially all of their active surfaces when in action practically unobstructed to the impinging air from all directions, means for placing the said stabilizers in action, a device for rectifying the vertical displacement, and means for operating the said last mentioned device.

12. A flying machine comprising a car, an aeroplane normally not having a strictly horizontal projection and extending outwardly on each side of the car, a second aeroplane mounted above the said first mentioned aeroplane and also normally not having a strictly horizontal projection and also extending outwardly on each side of the said car one of the said aeroplanes extending outwardly to a greater distance laterally than the other said aeroplane, openly spaced uprights connecting the said aeroplane, means for propelling the machine forwardly, means for raising one side of the machine more than the other mounted so as to receive the impinging air on substantially the whole of one of the sides thereof when in action, means for tilting the machine front and rear mounted so as to receive the impinging air from every direction on substantially the whole of the upper or lower sides thereof when active substantially equally, means for turning the machine to the right and left mounted so as to receive the impinging air from every direction on substantially the whole of each of its sides thereof when active substantially equally, and means for operating all of the above mentioned means.

Reporter's Statement of the Case

13. A flying machine comprising a car, an aeroplane normally inclined to the horizontal, a propeller mounted on each side of the said car, motive power for driving the said propellers, a pair of lateral stabilizers, also mounted one on each side of the said center line so as to receive the impinging air from all directions on substantially the whole of their lower surfaces when active, connections between the said stabilizers for operating the same simultaneously, means for rectifying the vertical displacement of the machine, and means for turning the machine to the right and left.

17. A flying machine comprising a car, an aeroplane normally curved longitudinally and having a substantially free periphery normally inclined to the horizontal, means for driving the machine forwardly, motive power for operating the said forwardly driving means, a device mounted on a substantially transverse axis for shifting the machine from its normal position to another position, a second and substantially similar device substantially similarly mounted for shifting the machine from the said normal position to still another position, a third and substantially similar device substantially similarly mounted for shifting the machine from the said normal position to still another position, a fourth device substantially similarly mounted for shifting the machine from the said normal position to still another position, two of the said devices being substantially in line horizontally with the said means for driving the machine forwardly, and means for operating all of the said aforementioned devices.

18. A flying machine comprising a car, an aeroplane with a free periphery normally having a curved and substantially unbroken surface inclined to the horizontal and extending on each side of the said car to a distance at least equal to the depth of the said aeroplane, a second aeroplane constructed in sections vertically disposed below the said first mentioned aeroplane and also extending outwardly on each side of the said car to a distance at least equal to the depth of the said aeroplane, openly spaced uprights connecting the said aeroplanes near their peripheries, means for driving the machine in a forwardly direction, means for operating the said last mentioned means, a plurality of devices for raising one side more than the other, a device for tilting the machine front and rear, a device for turning the machine to the right and left, and means for operating all of the said devices.

25. An aeronautical vehicle having means for accommodating an operator, an aeroplane normally inclined to the horizontal and extending outwardly on each side of the longitudinal center line of the machine, a second aeroplane vertically disposed to the said first mentioned aeroplane and also extending outwardly on each side of the said center line, uprights connecting the said aeroplanes, a shaft having an axis lying outside the body of each of the said aeroplanes and mounted on one side of the center line, a similar shaft similarly mounted on the opposite side of the said center line, stabilizing means mounted on each of the said shafts and situated so as to receive the impinging air on substantially the whole of one of the surfaces thereof when active, and means for placing the said stabilizing means in action.

26. An aeronautical vehicle having means for accommodating an operator, an aeroplane normally inclined to the horizontal and curved longitudinally and extending outwardly on each side of the longitudinal center line of the vehicle, a second aeroplane vertically disposed to the said first mentioned aeroplane and also extending outwardly on each side of the said center line, a plurality of openly spaced uprights connecting the said aeroplanes, a plurality of stabilizing means mounted between the said aeroplanes one on each side of the said center line, each of the said stabilizing means being mounted so as to receive the impinging air on substantially the whole of one of the sides thereof when in action, means for placing the said stabilizing means in action, and connections between the said stabilizing means.

27. An aeronautical vehicle having means for accommodating an operator, an aeroplane inclined to the horizontal, a second aeroplane vertically disposed to the said first mentioned aeroplane both of the said aeroplanes extending on each side of the longitudinal center line of the vehicle, openly spaced uprights spacing the said aeroplanes, a plurality of stabilizing means mounted one on each side of the said center line and each of the same having substantially all of one of its surfaces when active practically unobstructed to the impinging air and their axes lying near to the periphery of one of the said aeroplanes, and means for placing the said stabilizing means in action.

30. An aeronautical vehicle having means for accommodating an operator, an aeroplane normally inclined to the horizontal and extending on each side of

the horizontal center line of the vehicle, a second aeroplane also extending on each side of the said center line with its advancing edge forward of the advancing edge of the said first mentioned aeroplane, openly spaced uprights rigidly connecting the same, means for raising one side of the machine more than the other mounted so as to receive the impinging air on substantially the whole of one of its surfaces when active, means for tilting the machine front and rear, means for turning the machine to the right and left, and means for operating all of the above mentioned means.

6. The original specification of the patent in suit at the time of filing in the Patent Office September 20, 1905, contained the following disclosure with reference to the horizontal propellers and associated structures for stabilizing or controlling the attitude of the airship.

> Driving blades f' assist the balloon in raising the machine from the ground and in sustaining the machine after the balloon has been deflated. They are preferably three in number, as shown, and are placed symmetrically with respect to each other, so as to increase the stability of the machine and distribute the weight of the lifting blades and their driving shafts. Sheaves, f^2, on the propeller shafts e^5 actuate the driving ropes f^3, which pass over the idlers f^4 to sheaves f^5 on the shafts f^6, and clutches are provided upon the shafts f^6 for clutching the blades f' to said shafts when desired, either simultaneously or independently. A sheave f^7 on the shaft f^6 carry the driving ropes over idlers f^8 to sheave f^9 on a shaft f^{10}, upon which by means of a clutch, actuated by the lever f^{11}, the right hand lifting blade may be thrown in or out. The front lifting blades may be operated in the same manner as the left hand blades, the lever f^{12} effecting the coupling and uncoupling. All of the operating levers are placed within reach of the aeronaut standing on the platform.

In that portion of the specification relating to the operation and control of the machine it is stated:

> * * * The machine is now sustained by the lifting screws, and the front or rear of the machine may be tilted by the operator as desired, by driving one of the engines faster than the other, inasmuch as the forward lifting screw is driven by one of the engines and the rear lifting screws by the other.

> The forwardly-driving propellers are now thrown into gear with their actuating shafts, by means of the clutch levers, and the machine will move forward. When it has attained a certain velocity, the lifting screws may be unclutched from their shafts, and the whole weight of the machine will then be borne by the aeroplane. When the desired speed has been acquired, the forwardly-driving propellers may also be disconnected from their engines, and the machine will soar, on the aeroplane.
>
> *   *   *   *   *
>
> Another expedient for shifting the machine to a higher or lower level, is to rotate the front lifting screw alone, or the rear lifting screws conjointly. If it be desired to raise one side of the machine more than the other, the front lifting screw and one of the rear ones may be rotated. To turn to the right or left, one or the other of the forwardly-driving propellers may be used, as the case may be.

The following is typical of the subject matter claimed when the application was filed:

Original Claim 3. "A flying machine, provided with an aeroplane, consisting of a number of annular planes, arranged one above another, and brace planes arranged at right angles to said annular planes; substantially as described."

Original Claim 7. "A flying machine, provided with an aeroplane, consisting of a number of annular planes, arranged one above another, and a propeller for driving the flying machine forward; substantially as described."

Original Claim 11. "A flying machine, provided with an aeroplane, consisting of a number of annular planes, arranged one above another, and three lifting screws symmetrically disposed upon the machine with respect to a common center; substantially as described."

The original disclosure is sufficient to form a basis for the phraseology of the claims in suit.

A certified copy of the file wrapper of the application which matured into the patent in suit, defendant's exhibit 40, is by reference made a part of this finding.

7. During the prosecution of the Myers patent application which materialized into the patent in suit the Patent

Office declined to permit the applicant Myers to designate said application as a "continuation" of a prior application serial number 621233, filed January 29, 1897, and only permitted the applicant to designate it as a "continuation in part," which part was the feature characterized by a series of superposed annular planes of varying diameter.

The prior application filed January 29, 1897, contains no disclosure of the combinations of elements, or alleged improvements specified by the phraseology of the claims in suit, and the application which matured into the patent in suit is not a continuation of the prior application as to the subject matter of any of the claims in suit.

A certified copy of the file wrapper of the Myers application serial number 621233, plaintiff's exhibit 58, is by reference made a part of this finding.

8. There is no satisfactory evidence to show any date of invention of the alleged subject matter defined by the claims in suit prior to September 20, 1905, the filing date of the application on which the patent in suit was granted.

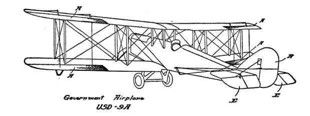
9. There is no satisfactory evidence that any machine similar to that disclosed in the Myers patent in suit in its arrangement and construction of lifting surfaces has ever flown.

There is no satisfactory evidence that any machine similar to the one disclosed in the Myers patent in suit, in that it is dependent upon lifting screws for lateral or longitudinal equilibrium control, has ever flown.

10. To simplify the issues and as representative of the various types of machines claimed to be used by the United States and for the purpose of determining infringement of the patent in suit, it was stipulated that two airplanes known respectively as the USD–9A and The Model F Flying Boat were in use by the United States at the time (June 2, 1923) plaintiff's petition was filed.

The Government aeroplane USD–9A is illustrated and described on pp. 5 to 84, inclusive, of the Bulletin of the Experimental Department, Aeroplane Engineering Division, U. S. A., plaintiff's exhibit 16, which is by reference made a part of this finding.

The aeroplane, known as the Model F Flying Boat, is illustrated on p. 10 of plaintiff's exhibit 23, and in photographs identified as exhibits L and M, and in blueprints identified respectively as exhibits N, O, and P, which exhibits are annexed to the stipulation of August 8, 1927, and made a part of this finding by reference.



11. The constructional features in issue of the Government aeroplane USD-9A are diagrammatically illustrated in the drawing above.

(a) Lifting means

This aeroplane is of the biplane type, comprising a conventional elongated fuselage or body. The lifting surfaces comprise two superposed wings, both the upper and lower wings extending substantially at right angles to the fuselage and to the longitudinal axis of the machine, the lower wing extending laterally from each side of the fuselage and the upper wing extending entirely across the machine. The wings, which are relatively long and narrow, have a pronounced convex shape on the upper surface in the fore and aft direction and are slightly concave on their lower surfaces.

Both wings in the USD-9A have a positive angle of incidence, that is to say, the wing chord, or a straight line tangent to the lower front and rear edges of the wing, inclines upwardly from the rear to the front at an angle to

the axis of the propeller shaft and the line of thrust of the propeller, so that when the machine is in horizontal flight the impinging air strikes the under surface of the wing and consequently exerts an upward lifting pressure thereon. The positive angle of incidence for both wings of the USD–9A is 3 degrees.

In the USD–9A the wings have a relation to each other known as "stagger"; that is to say, the leading edge of one wing projects further forward than the leading edge of the other wing. In the USD–9A the leading and trailing edges of the upper wing project 12½ inches in advance of the leading and trailing edges, respectively, of the lower wing, providing what is known as positive stagger.

(b) Propulsion means

The propulsion means comprise an internal combustion motor mounted in the forward part of the fuselage which motor drives a single two-blade propeller of the tractor type in front of the fuselage; the axis of the propeller shaft coincides with the longitudinal axis of the aeroplane.

(c) Control means

The aeroplane is controlled in flight about the three rectangular axes of the machine by the following controlling instrumentalities:

To control the elevation two horizontal rudder-like surfaces, E, E, are hinged to the rear of the stabilizers and are connected together to move as a single unit. These control surfaces are connected by operating cables or wires to an upright universally mounted lever known as the "joy stick" in front of the operator who by a fore and aft movement of the stick can swing the elevator surfaces up or down, thus causing the aeroplane to ascend or descend.

Directional control is provided by means of a vertical steering rudder R mounted on a vertical axis in the rear of the fuselage. This is controlled by wires or cables connected to a foot lever in front of the pilot by means of which the aeroplane may be steered to the right or to the left.

Lateral or rolling control about the longitudinal axis is provided by means of structure termed "ailerons."

The ailerons comprise outer rear portions of each wing hinged on a horizontal axis extending lengthwise of the wing. These ailerons, which are indicated on the diagram by the reference character A, are so shaped that when in neutral position they preserve the general fore and aft curvature of the wing and the generally rectangular contour of the wing.

All four ailerons are interconnected to each other and to the joy stick by control wires or cables so that when the joy stick is moved laterally both ailerons on one side of the machine are swung down, thereby functioning to increase the lift of the wings on that side of the machine. Such movement of the stick causes the ailerons on the other side to swing upwardly, thereby functioning to decrease the lift and thus causing the machine to roll about its longitudinal axis. When the joy stick is moved laterally in the opposite direction the machine is caused to roll in the opposite direction.

When the ailerons occupy neutral positions with relation to the wings, they serve as component parts of the wings, contributing their lifting effect to that of the wings and to the support of the aeroplane approximately in the proportion which the area of the ailerons bears to the total area of the wings.

All these three control means—elevational, directional, and lateral—may be manipulated by the pilot through the two control devices—the joy stick and the rudder control lever.

12. The second Government machine, the Model F Flying Boat, resembles the USD-9A machine in that it is of a biplane type of construction. It has an elongated fuselage, the bottom of which is shaped in the form of the hull of a boat enabling it to alight on water, float thereon, and take off therefrom. A pontoon is also fastened to the underside of each end of the lower wing. A front view of the Model F Flying Boat is diagrammatically illustrated in the drawing reproduced herewith.

(a) Lifting means

The wings of the Model F Flying Boat are relatively long and narrow, each wing having the usual fore and aft curvature. The wings are spaced apart by a front and rear row of vertical struts. The span of the upper wing is greater than that of the lower wing, each end of the upper wing extending a distance of substantially 5 feet beyond the end of the lower wing. The wings have a positive angle of incidence of 6½ degrees and have no "stagger."

(b) Propulsion means

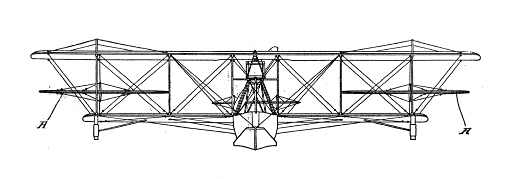
The propulsion means comprise an internal combustion engine mounted above the fuselage driving a single double-blade propeller of the pusher type located just at the rear of the wings with its propeller shaft above but in the same vertical plane as the axis of the shafts.

(c) Control means

The means for directional and elevational control are substantially the same as previously described in finding 11 (c) in connection with the USD–9A machine, comprising respectively a vertical steering rudder and a horizontal elevator formed in two parts on opposite sides of the rudder, the horizontal elevator being connected for manipulation by a fore and aft movement of the control post.

The lateral control is provided by two hinged ailerons designated on the diagrammatic drawing as A, A. These ailerons are similar in function to the ailerons on the USD–9A machine in that when swung in opposite directions, one up and the other down, they act to produce a roll of the aeroplane about its longitudinal axis. The two ailerons are interconnected to a control in front of the pilot so that they may be operated for this function. The ailerons, which comprise about 15% of the total aggregate area of the wings and ailerons combined, when in their neutral position contribute to the support of the machine when in normal flight.

13. At the time of filing the Myers application, which materialized into the patent in suit, there were filed in the



Government Airplane

Model F Flying Boat

Patent Office (September 20, 1905) the following United States and foreign patents which had been issued and were part of the prior art:

Country	Name	No.	Date	Exhibit
United States	Johnston	383889	June 5, 1888	Deft's Ex. 9
" "	Mouillard	582757	May 18, 1897	" " 12
" "	Tarczal	701644	June 3, 1902	" " 15
" "	Johnston	722516	Mar. 10, 1903	" " 16
Great Britain	Henson	9478	Sept. 29, 1842	" " 5
" "	Harte	1469	May 21, 1870	" " 6
" "	Phillips	13768	Oct. 17, 1884	" " 8
" "	Phillips	13311	Aug. 6, 1891	" " 10
" "	Lanchester	3608	Feb. 10, 1897	" " 11
" "	Chanute	13372	May 31, 1897	" " 13
" "	Moy	15221	June 25, 1897	" " 14
France	Penaud & Gauchot	111574	Feb. 18, 1876	" " 7
"	Wright	342188	Mar. 22, 1904	" " 17

Copies of the foregoing patents are by reference made a part of this finding, together with translations (defendant's exhibits 7A and 17A, respectively) of the French patents, defendant's exhibits 7 and 17.

14. The following publications formed a part of the prior art at the time the Myers application was filed:

Goupil's 1884 Edition "La Locomotion Aérienne," published at Charleville, France, in 1884, pages 64, 100, 101, 103, and 104, Plates V, VI, and VII.

"Experiments in Aerodynamics" by S. P. Langley, published by the Smithsonian Institution in 1891, pages 26 to 47, inclusive, and 105 to 108, inclusive.

"Aviation" by A. Goupil, published at Tours, France, in 1893, Chapter XX and Plate XIV.

"Progress in Flying Machines" by O. Chanute, published at New York City in 1894.

"Proceedings of the International Conference on Aerial Navigation," held in Chicago, August 1, 2, 3, and 4, 1893, published at New York City in 1894, pages 66, 81 to 83, inclusive, and pages 272 to 287, inclusive.

"The Aeronautical Annual" for the years 1895, 1896, and 1897, published at Boston, Mass., by W. B. Clarke & Co., in the respective years named.

"McClure's Magazine" for June 1897, published at New York City, June 1897, article entitled "The Flying Machine," by Professor S. P. Langley, pages 647 to 661, inclusive.

"McClure's Magazine" for June 1900, published at New York City, June 1900, article entitled "Experiments in Flying," by O. Chanute, pages 126 to 133, inclusive.

Magazine "Flying" for June 1902, article by Sidney H. Hollands, entitled "Motor Aviation of Today and of Recent Years," published at London, June 1902, pages 116 to 119, inclusive.

Magazine "Illustrierte Zeitung," published in Leipzig and Berlin, March 5, 1903, article by Raimund Nimfuhr, entitled "Die Nuesten Fortschritte in der praktischen Fliegekunst," page 351.

"Journal of the Western Society of Engineers," published at Chicago, August 1903, containing an address by Wilbur Wright, entitled "Experiments and Observations in Soaring Flight," read before the Western Society of Engineers, June 24, 1903.

"Journal of the Western Society of Engineers," Vol. VI, No. 6, published at Chicago, December 1901, pages 489 to 510, inclusive, article by Wilbur Wright, entitled "Some Aeronautical Experiments."

Magazine "La Locomotion," published at Paris, April 11, 1903, article entitled "M. Chanute à Paris," pages 225 to 227, inclusive.

Magazine "L'Aerophile" for August 1903, article entitled "La Navigation Aérienne aux États-Unis," by O. Chanute, published at Paris, August 1903.

"Scientific American," Vol. LXXXIX, No. 16, page 272, article entitled "The Failure of Langley's Aerodrome," published at New York, Oct. 17, 1903.

"The American Inventor," Vol. XI, No. 9, pages 208–209, article by C. H. Claudy entitled "The Langley Flying Machine," published at Washington, November 1, 1903.

"Illustrierte Aeronautische Mitteilungen," article by Dienstbach, entitled "Das erste Lebensjahr der praktischen Flugmaschine," pages 91 to 93, inclusive, published at Strasburg, Germany, March 1905.

"L'Aerophile" for June 1905, article by Robert Esnault-Pelterie, entitled "Expériences D'Aviation," pages 132 to 138, inclusive, published at Paris, June 1905.

Copies of the foregoing publications (defendant's exhibits 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, and 38, respectively), together with translations (defendant's exhibits 20A, 22A, 29A, 33A, 34A, 37A, and 38A, respectively, of exhibits 20, 22, 29, 33, 34, 37, and 38) are by reference made a part of this finding.

15. The publication entitled "La Locomotion Aérienne" by Goupil, published in 1884, suggests and discloses a heavier-than-air flying machine comprising a streamlined fuselage having at its forward end a motor-driven propeller. The lifting surfaces comprise two wings fastened to the upper part of the fuselage and extending outwardly at right angles, these wings being curved in a fore and aft direction and having a positive angle of incidence.

A three-rudder control is disclosed comprising a horizontal hinged rudder or elevator at the rear of the fuselage for elevational control, a vertical steering rudder at the rear of the fuselage for steering to the right or left, and two ailerons referred to as "regulators" for lateral control, each mounted on a horizontal axis transverse to the line of flight, one on each side of the fuselage. The publication suggests this functional operation of the regulators in the following phraseology:

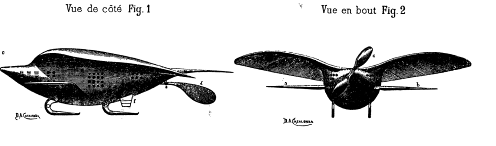
> If the aeroplane inclines to the right, the right surface presents its under face to the current, while that on the left presents its upper face, from which there result energetic pressures which right the apparatus.
>
> The opposite effect is produced if the aeroplane inclines to the left. If the aeroplane inclines to the front, the two regulators present their under faces to the current and raise the forward end, and inversely should the aeroplane rise too forcibly.

Mechanical connections for operating these several elements of control are provided in the fuselage within reach of the pilot. It is suggested that the ailerons may be operated either manually or automatically controlled by the action of a pendulum.

An illustration from this publication showing a side and front view of the machine is appended.

16. The British patent to Harte, No. 1469 of 1870 (defendant's exhibit 6), suggests an aerial vehicle or flying

AEROPLANE A VAPEUR



Vue de côté Fig. 1

Vue en bout Fig. 2

machine comprising a rigid wing system with a propeller behind the fixed wings. The wings are provided with a hinged flap or aileron, the function of which is to alter the lifting power of the wing.

The specification states, with reference to this construction, as follows:

> * * * At the end and back or hinder part of each wing is a flap which moves up and down upon a hinge in the back edge of the wing. This hinge is prolonged in the shape of a rod, and this rod is in connection with a lever, by means of which the flap is made to rise above or fall below the rest of the surface of the wing, this lever being in connection with a second lever which is within reach of the person who steers the machine.
>
> * * * The motion of the fans of the screw propeller being rotary tends to give a rotation to the whole machine in the opposite direction. This I counteract by means of the flaps of the wings, each of which acts upon the principle of a ship's rudder, and their combined action is such that when one flap is turned up and the other down they simply counteract this tendency of the machine to rotate and keep it steady. When both flaps are depressed the machine will descend, when both are equally raised it will ascend, and when both are raised but unequally the machine will make a curve towards the side on which the flap is most raised.

This construction is disclosed in Fig. 5 of the drawing of the Harte patent, which figure is diagrammatically reproduced herewith:

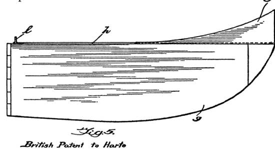


Fig. 5.

British Patent to Harte 1469 of 1870

In the illustrated drawing, the wing is shown by the reference character *g*, the aileron or flap by the reference character *y*, the hinge by the reference character *h*, and the operating lever by the reference character *l*.

17. The book Aviation published by Goupil in 1893 discloses both by text and illustration a heavier-than-air flying machine comprising a fuselage having a propeller at its front end and a vertical steering rudder at its rear end. The machine is provided with a single central circular wing set at an angle of incidence of three degrees, its upper surface having a convex curvature.

Equilibrium control is provided by four supplemental wings, two on opposite sides of the longitudinal axis of the machine in front of the central circular wing, and two on opposite sides of the longitudinal axis of the machine to the rear of the central circular wing. Each of these supplemental wings is pivotally turned on a horizontal shaft or axis so as to change its angle of attack to the relative wind.

The use of these four supplemental adjustable wings is for equilibrium control. To lift one side of the machine it is suggested that the supplemental wings on that side may be moved automatically or at the will of the pilot to increase their angle of incidence. To tilt the machine front or rear the wings at the front or rear of the machine, as the case may be, are simultaneously moved to increase their angle of incidence.

18. It was old in the art of heavier-than-air flying machines employing aeroplanes for their support, prior to the time Myers devised his alleged improvements, to provide power-operated screw propellers turning on normally vertical shafts for stabilizing the machine by lifting one side more than the other or by tilting the machine front and rear.

United States patent to Johnston No. 383889, granted June 5, 1888, illustrates and describes a heavier-than-air machine with two motor-driven propellers at its rear for propulsion and two vertical rudders for steering to the right and

left, one at the front and the other at the rear, together with means for controlling them.

This machine employs four lifting screw propellers for raising one side of the machine more than the other and for tilting the machine front and rear. These each turn on a normally vertical axis driven independently each by its own motor. Two of the lifting propellers, one forward and the other rear, are located on one side of the machine, and the remaining two, one forward and the other rear, on the opposite side. Control devices are provided for the motors of the lifting propellers to operate independently any one propeller at a greater or lesser speed of rotation. As disclosed, such control devices are automatic and serve to stabilize the machine laterally and fore and aft to correct a roll or a pitch. Such control devices are in the form of pendulum controllers. Should the machine incline laterally, one of these controllers swings transversely the machine and increases the speed of the lifting propellers on the low side to raise that side of the machine. Should the machine nose up or down, the other of these controllers swings longitudinally of the machine and increases the speed of the lifting propellers at the low end of the machine to restore equilibrium by tilting the machine down or up.

Figure 2 of the Johnston patent, which illustrates the positioning of the four horizontal equilibrium controlling propellers, is reproduced on page 25.

19. Orville Wright and Wilbur Wright, of Dayton, Ohio, took up the study of aviation in 1896. In 1899 they devised a method of warping a wing to alter its lift contour for the purpose of providing equilibrium or lateral control.

During 1900, 1901, and 1902 a number of man-carrying gliders were tested by the Wright brothers at Kitty Hawk, N. C., which tests established the practicability of equilibrium control by altering the contour of the wings.

These experiments culminated in the construction and the first successful flights of a motor-driven airplane carrying and subject to the control of a human operator on December 13, 1903, which flights were made in the presence of a number of witnesses.

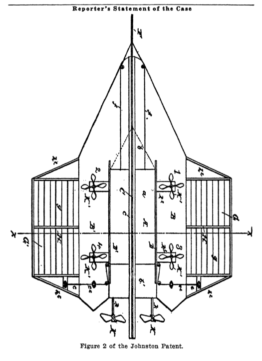
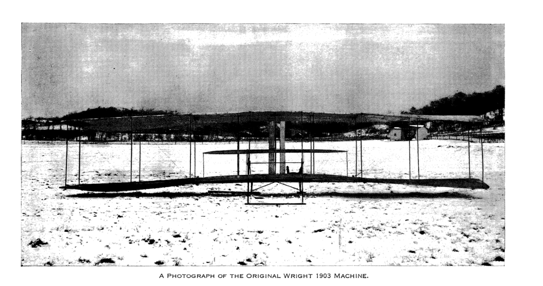


Figure 2 of the Johnston Patent.

(a) Lifting means

The Wright 1903 machine was of the biplane type having two wings of about 40 foot span and 6½ foot depth. These wings which were curved were spaced apart by a plurality of front and rear struts which divided the wings into a series of eight panels. The four central panels were rigid both laterally and fore and aft.





A Photograph of the Original Wright 1903 Machine.

(b) Propulsion means

The propulsion means comprised an internal combustion engine driving two propellers located at the rear of and between the wings.

(c) Control means

The outer two panels of each wing were rigid at the front edge and flexible at the rear. Control wires were connected to the spars of the two outer panels so as to flex the rear portions of the tips of the wings in such manner as to increase the contour or lift at one end and decrease the contour or lift at the opposite end for the purpose and function of lateral control.

The Wright machine was provided with a front horizontal rudder system for elevational control and a rear vertical rudder system for directional control.

A photograph (defendant's exhibit 38–5) of the original Wright 1903 machine completely assembled with the exception of the power plant and propellers is reproduced facing this page. The machine as illustrated shows the lateral controls in such position as to increase the lift of the righthand wings and decrease the lift of the lefthand wings.

20. During the winter and spring of 1904 the Wright brothers constructed another power-driven machine almost exactly like the 1903 machine except that most of the parts were of heavier construction and a more powerful motor was provided. Public flights were made with this machine on a field 8 miles east of Dayton, Ohio. During the year 1904, 105 flights or attempted flights were made, some flights being of considerable length.

21. An article by Esnault-Pelterie entitled "Expériences D'Aviation," published at Paris June 1905, in the publication "L'Aerophile," describes certain experiments made with gliders, some of similar construction to those used by the Wright brothers. The glider described both by the text and illustration in the article differs however from the construction utilized by the Wright brothers in that instead of warping the extremities of the wing surfaces to obtain equilibrium control the wing surfaces were rigid, and horizontal rudders were provided at the extremities of the aeroplane.

A translation of a portion of the article reads as follows:

> The torsion of the surfaces recommended by the Wright Brothers, and which we tried out, gives very good results for maintaining the transversal equilibrium, but we consider this system dangerous. It may in our opinion cause exaggerated stresses on the stays and we fear consequently that ruptures may occur in the air which could not happen with the ordinary rigid system. The ruptures on landing of which we however did not have a single one during these second experiments, are only of secondary importance; ruptures in the air would naturally be fatal to the experimenter. We therefore felt obliged to abandon the warping.
>
> In order, however, to be able nevertheless to affect the lateral equilibrium we used two horizontal rudders at the front, these being independent and placed each one at one extremity of the aeroplane. These two rudders were connected each one to a small steering wheel within reach of the two hands of the operator (see Figs. 5 and 6).
>
> When these two rudders were operated simultaneously they acted upon the anterio-posterior stability; when on the contrary they were operated in opposite direction they acted on the transverse stability.
>
> This arrangement gave satisfaction although it was not as powerful as the warping of the surfaces.

22. The Government aeroplanes, the USD-9A and the Model F Flying Boat, find their origin in the teachings and suggestions of the prior art with respect to the three separate subdivisions of the constructional features, as follows:

(a) Lifting means

Both Government machines follow and apply the principles in construction of the 1903 Wright aeroplane, in that they both possess a pair of fore and aft curved wings normally inclined to the horizontal during progress through the air, and extending on each side of the horizontal center line of the aeroplane, the said wings being spaced apart by means of a plurality of openly separated uprights or struts located at or near the peripheral edges of the wings.

In the Model F Flying Boat the span of the upper wing extends approximately 5 feet beyond the ends of the lower one, a construction which is referred to as "overhang."

Such constructional wing detail is described and illustrated on page 113 of the publication "Progress in Flying Machines," by Chanute, published 1894, referred to in finding 14.

The biplane wings of the Government aeroplane USD-9A possess what is known in the art as "stagger," the leading and trailing edges of the upper wing projecting 12½ inches in advance of the leading and trailing edges of the lower wing.

Such constructional detail is disclosed in United States patent to Tarczal, No. 701644 of June 3, 1902, referred to in finding 13.

(b) Propulsion means

The propulsion means of both Government aeroplanes are similar to the Wright 1903 aeroplane construction in that they utilize an air screw or propeller driven by an internal combustion engine.

(c) Controlling means

The directional control and the elevational control present in both Government aeroplanes are similar to these same controls in the Wright 1903 machine in that a vertically mounted rudder is utilized for directional control and a horizontally mounted rudder or control surface is utilized for elevational control.

In the USD-9A Government machine, lateral control is equivalent to the lateral control of the Wright 1903 machine in operation and function in that it is obtained by increasing the contour or lift at one end of the wings and simultaneously decreasing the contour or lift at the opposite end of the wings by bending the outer rear portions of the wings to accomplish such result. The USD-9A Government machine mounts the ailerons or control surfaces upon a hinge in a manner similar to that suggested in the British patent to Harte (see finding 16).

In the Model F Flying Boat construction the ailerons are separate control surfaces mounted intermediate of the wings in the manner suggested in the article "Expériences D'Aviation" by Esnault-Pelterie, published in June 1905

(see finding 21), and also suggested by the separate ailerons described and illustrated in the article "La Locomotion Aérienne" by Goupil, published in 1884 (see finding 15).

23. From the prior art and knowledge available to those skilled in the art the claims in suit nos. 2, 3, 12, 13, 17, 18, 25, 26, 27, and 30 are not directed to novel and patentable subject matter and are invalid.

The court decided that the plaintiff was not entitled to recover.

Booth, *Chief Justice*, delivered the opinion of the court:

The plaintiff alleges that the defendant infringed his patent #1226985 granted May 22, 1917, for a Flying Machine. In both the briefs and oral argument the contention is made that plaintiff's patent is a basic one and plaintiff a pioneer inventor. Finding 5 discloses the claims at issue. Ten are relied upon by plaintiff.

Finding 4 depicts in accurate terms, and also discloses by illustrations, plaintiff's conception of a flying machine and the specified manner of its operation. The facts therein found and the illustrative figures are taken from the patent in suit.

The patent relied upon by plaintiff was granted to him on May 22, 1917, upon an application filed in the Patent Office September 20, 1905. This last date becomes an important element in the decision of this case, and its determinative character exacts a discussion of the issue as to the validity of the patent in suit in view of the prior art.

The defendant introduced into the record a great many foreign and domestic patents pertaining to the art involved which had been issued prior to plaintiff's application of September 20, 1905. In addition to prior art patents, several important scientific publications having to do with the art of aviation were introduced, each one antedating the plaintiff's application for the patent relied upon.

Finding 3 recites, and it is manifestly accurate as scientific principles disclosed, that a flying machine, i. e., a heavier-than-air machine, one capable of soaring in the air and susceptible to being guided by a pilot into different attitudes when aloft, involved at least three basic elements.

The inventor interested in the art faced the problem of creating a mechanism which would not only utilize them but bring them within the reach of control.

The task was not an easy one. First, it was absolutely essential that the mechanism possess some means of "exerting lift." A balloon—old in the art—could be and was used to obtain altitude. Balloons when inflated with hot air or a gaseous medium could "exert lift." However, it was soon discovered that attaching a balloon to a mechanism designed to fly when the balloon was either detached therefrom or inflated in midair was not only hazardous but in no way contributed to the art of creating a mechanism capable of "exerting lift" without resort to extraneous means.

The "lift" problem was successfully solved some years before the plaintiff's patent came into existence. Wing surfaces were so scientifically constructed that when the mechanism was propelled through the air at a suitable angle the essential element of "exerting lift" obtained. The mechanism as a unit arose from the ground and the question of attitude was one for the pilot.

The second essential element in any flying mechanism of the character here involved is propelling means. In saying "the second essential element" we do not mean in degree of importance, for obviously cooperation is essential. Propelling means are obtained from combustion engines designed and adjusted to operate a propeller or propellers, which, as Finding 3 discloses, "exert a forward thrust." To invent an aeroplane engine exacted a high degree of inventive skill. To conceive its use as a propelling means did not. The problem in the beginning was one of weight.

It was not in any sense new at the time plaintiff was granted his patent to employ a combustion engine or engines to obtain propelling means for a flying mechanism. It is true the plaintiff specifies the use of two engines of his mechanism not only to obtain a forward thrust of the same but also to steer it either to the right or left as desired. This feature is immaterial to the present issue. The defendant's mechanism did not in any way adopt it.

An indispensable element of any flying machine is a control mechanism. The control of the equilibrium of a

flying machine relative to "its attitude about the three rectangular axes of the machine" is manifestly of fundamental importance, and was from the beginning a subject matter of extensive research and experimentation. The history of the art is extensive with respect to means of control.

It is necessary to refer to Figures 1 and 3 of Finding 4 to understand plaintiff's patent with respect to control mechanisms. To obtain lateral control two rudders, v^3 and v^4, are attached as indicated in Fig. 3. The two rudders are pivoted so as to respond to the desired manipulation of suitable cords and designed to steer the mechanism to the right or left. They are as plaintiff states: "mounted on either side of the longitudinal center line of the machine" and are intended "to turn the latter about its vertical axis."

Equilibrium or attitude control was effected by utilizing three (3) horizontal propeller blades f–1, f–13, and f–14, Fig. 3. Two of the blades are located in the rear of the machine and one in front, each one being mounted so as to rotate upon a vertical axis. Rotation of the blades is secured by power from the engines "by means of belts, pulleys, and clutches." To lift the front of the machine f–14 is alone actuated, it being asserted that this operation causes the exertion of a lifting force and serves to tilt the same upwardly.

Propellers f–1, f–13, actuated either separately or simultaneously, are designed as the findings show "to alter the attitude of the machine about the flight axes", and in the patent specifications the public is told that the two rear lifting screws used conjointly will function to cause the machine to attain a higher or lower level.

What has been said does not point out in technical detail all the elements going to make up the plaintiff's mechanism. Reference to Finding 4 and the illustrative figures 1 and 3 will supply the purposely omitted details. The plaintiff's claim is that he was the first to conceive and later construct a flying machine which disclosed and taught to those skilled in the art the mechanical means for utilizing the scientific factors essential to flying.

Plaintiff contends that his patented mechanism provides lifting means similar to or the equivalent of the alleged

infringing ones, and a like contention is advanced with respect to propulsion and control means. It is argued with earnestness that the three (3) "lifting screws" or propellers f–1, f–13 and f–14 are the same as ailerons appearing in modern machines subsequent to his patent application.

The obstacle the plaintiff's contention encounters is the established fact that all the elements entering into his patented mechanisms were old in the art prior to his patent application of September 20, 1905, i. e., granting *arguendo* that what is claimed for the patent is as claimed. The plaintiff vigorously contends that the applicable prior art cited by defendant is not in fact prior art and not anticipatory. The contention rests upon a prior application of plaintiff filed January 29, 1897, the plaintiff asserting that his application of September 20, 1905, which finally matured into the patent in suit, is a continuation of his application of January 29, 1897.

We first take up the prior art. The findings disclose a number of prior art patents and prior publications. The citations are too numerous to discuss separately and while not confining anticipation to the patent granted to the Wright brothers upon an application therefor filed March 23, 1903, we believe this patent so clearly anticipates the one in suit that a discussion of others is unnecessary.

The 1903 machine of the Wright brothers is shown photographically in the findings, and the history of its development is likewise disclosed, commencing with Finding 19. This Wright machine was of the biplane type. Its two wings had a span of about 40 feet and a depth of 6½ feet. Each wing was curved and separated horizontally by a plurality of front and rear struts, thus dividing the wings into a series of eight panels, the central ones being rigid both fore and aft.

The Wrights used an internal-combustion engine for the same purpose plaintiff did, and the Wright method of wing warping to obtain lateral control, the equivalent of ailerons, was effective and successful. A horizontal rudder system to obtain elevational control was an element of the Wright machine, and directional control was secured by a vertical rudder system. Therefore, it is apparent that every fea-

ture of the patent in suit involving a lifting, propulsion, and controlling means was anticipated by the Wrights and other inventors.

If the claims of plaintiff's patent are given such a construction as to enable them to be readable upon the alleged infringing machines they will be readable with equal facility upon the prior art as exemplified by the Wright machine of 1903. An examination of the illustrated USD-9A, an alleged infringing machine (Finding 10), forces the irresistible conclusion that plaintiff's conception as embodied in the specification and claims of his patent was neither original nor new.

The USD-9A machine discloses ailerons A-A for lateral control, the horizontal rudders E-E for elevational control, and the vertical rudder R for directional control. The wing surfaces, propellers and structural features to obtain lifting power and stability exemplify in detail the Wright brothers' conception and patent of 1903. The Wright patent has been held valid. *Wright Co.* v. *Herring-Curtiss Co.*, 204 Fed. 597; 211 Fed. 654.

In the case of *Montgomery* v. *United States*, 65 C. Cls. 526, 554, 555, this court said:

> The Wrights, so far as the record herein is concerned, were the first to construct a device which successfully functioned in the desired way. The Wrights were assiduous in experimentation. In July 1901 at Kitty Hawk tests of a larger machine were made in the presence of a number of persons, including one very distinguished scientist. These tests involved a number of flights, and many of them were decidedly successful. Without recounting in detail the number of tests made by the Wrights, and the success which followed their scientific and laborious investigation of the art, it is sufficient to state that on December 17, 1903, the Wrights demonstrated the possibility of successful flying in a heavier-than-air machine, motor driven, carrying and subject to the control of a living operator. This machine soared from the ground, demonstrated the possibility of control in sustained flight, and glided safely to earth in response to the operator's desire.

The machine specified and claimed by the present patentee never flew. It has never been recognized by those skilled in the art as practical or operative.

Opinion of the Court

We come now to plaintiff's vigorous contention that the patent in suit is a continuation in part of his first patent application #621,233 filed January 29, 1897, and if so the Wright brothers' machine and others are not prior art. The rule of law applicable is well established. *Chapman* v. *Wintroath*, 252 U. S. 126.

The question of continuity of invention as applied to applications for patents filed upon different dates to entitle an earlier one to priority is one of fact. The question of law involved in the issue is stated by the court in the case of *Good Roads Co.* v. *Charles Hvass Co.*, 70 Fed. (2d) 625, 627. The court said:

> [3] To support the claim of disclosure in the abandoned application, it must appear that there was a complete disclosure. General Electric Co. v. Continental Fibre Co., 256 F. 660, 664 (C. C. A. 2). There it was said:
>
> "* * * The doctrine of continuity 'broadly depends upon whether the substituted application is for the same invention as that disclosed in the original application.' * * * The queries in this case * * * are these: Could the claims in suit have been properly issued on the original specification."

The court's Findings 7 and 8 are the result of a careful examination of the record with respect to plaintiff's contention upon this point, and we are convinced that the findings are fully and completely sustained. We need not review the testimony in detail; it is lengthy, and, while not involved, exacts a factual discussion which the record does not warrant. In the *Esnault-Pelterie case*, 303 U. S. 29, 30, the Supreme Court said:

> In a patent case in the Court of Claims under the Act of 1910 the questions of validity and infringement are questions of fact. We have said that, for the purposes of our review in such a case, the findings of the Court of Claims "are to be treated like the verdict of a jury, and we are not at liberty to refer to the evidence, any more than to the opinion, for the purpose of eking out, controlling, or modifying their scope." *Brothers* v. *United States*, 250 U. S. 88, 93; *Stilz* v. *United States*, 269 U. S. 144, 147, 148; *United States* v. *Esnault-Pelterie*, *supra*. The requirement that the Court of Claims should find the ultimate facts

Syllabus

which are controlling places upon that court the duty of resolving conflicting inferences and to draw from the evidence the necessary conclusions of fact. *United States* v. *Adams*, 6 Wall. 101, 112. Even though the finding determines a mixed question of law and fact, the finding is conclusive unless the court is able "to so separate the question as to see clearly what and where the mistake of law is." *Ross* v. *Day*, 232 U. S. 110, 117; *United States* v. *Omaha Indians*, 253 U. S. 275, 281; *Stilz* v. *United States*, *supra; United States* v. *Swift & Co.*, 270 U. S. 124, 138.

The Commissioner of Patents upon two occasions declined to allow the contentions, and we think it clear that the claims relied upon in the instant case could not have been issued upon plaintiff's 1897 application.

Plaintiff's date of invention does not antedate September 20, 1905, the filing date on which the patent in suit was granted and plaintiff is not entitled to any earlier date.

From the prior art and knowledge set forth in the findings of fact and which we have discussed *supra*, particularly in connection with the Wright 1903 biplane, we are of the opinion that the claims in suit are not directed to novel and patentable subject matter and are therefore invalid.

The petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

THE VIRGINIAN RAILWAY COMPANY v. THE UNITED STATES

[No. 42561. Decided December 5, 1938. Plaintiff's motion for new trial overruled March 6, 1939]

On the Proofs

Government coal; difference between export and domestic freight rate.—Where shipments of coal were delivered by common carrier to the Naval Fuel Depot, and the common carrier collected from the owners of the coal, or their agents, freight charges on the basis of the export rates, on the presumption that the coal was to be used on voyages or to be transshipped, there can be no recovery from the Government for the difference between the export rate and the domestic rate when it transpires that a quantity of the coal was not trans-shipped but was diverted to local Government activities.

Reporter's Statement of the Case

Consignee.—Where the Government advertised for bids for coal f. o. b. the Navy Fuel Depot, and on shipments of coal delivered in accordance with these bids the freight charges were paid by the owners of the coal, or by their representatives, the Government was not the consignee, actually or by construction of law.

Same.—The party who pays the freight charges and receives delivery is the party responsible for payment of the lawful freight rate.

The Reporter's statement of the case:

Mr. John C. Donnally for the plaintiff. *Messrs. W. H. T. Loyall* and *Walter C. Plunkett* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is a common carrier by railroad of persons and property in interstate and intrastate commerce.

2. Some time prior to the year 1918 there was established at Sewall's Point, Virginia, a Naval Fuel Depot, used by the United States Navy for the storage of coal supplied from time to time to its vessels for use on voyages or at stations beyond the Virginia capes, and to a lesser extent for the storage of coal for local consumption.

The coal so stored at the Naval Fuel Depot originated at points on plaintiff's line or its connecting lines, had been transported over plaintiff's road, and delivered by it to the Naval Fuel Depot. It had been purchased by the Navy Department from various contractors, f. o. b. Naval Fuel Depot, Sewall's Point, Va. For transportation thereto the shipper or its agent had paid plaintiff at the rate of $2.52 per ton of 2,240 pounds, which was the regularly published tariff rate on coal transported and placed in storage at Sewall's Point awaiting trans-shipment to vessels having destination beyond the Capes of Virginia.

Coal not so trans-shipped was subject to a freight rate of $2.65 per ton of 2,000 pounds to Sewall's Point.

In advertising for bids for purchase of this coal the Navy Department did not state that trans-shipment thereof beyond the Capes of Virginia was contemplated. The prospective bidders without the knowledge of the defendant inquired of plaintiff as to what the tariff rate to the Naval

Fuel Depot would be, and they were informed by the plaintiff that the so-called "export" rate would apply, viz, $2.52 per ton of 2,240 pounds. Bids were made and accepted at a flat price, without stating the freight charges.

The coal, so purchased, arrived at plaintiff's terminal subject to the orders of the owners or their representatives, and upon inspection by the Government, the owners or their representatives ordered the coal to be delivered to the Naval Fuel Depot. The coal was there delivered and commingled in the Government's coal dump with other coal.

Payment of the freight charges due on the coal so transported and delivered was made to the plaintiff by the owners or their representatives at the "export" rate, upon bills rendered them by the plaintiff, and payment of no freight charges has been made by the Government to the plaintiff.

The Government was neither consignor nor consignee and never entered into any arrangement with the railroad for the transportation of the coal. All arrangements for transportation of the coal were made by the coal dealers or their representatives.

3. After the World War the increasing use of oil instead of coal for naval vessels led to the abandonment of the Naval Fuel Depot at Sewall's Point for the storage of coal. The final decision to abandon the storage plant was made by the Navy Department late in the year 1929.

Of the tonnage there stored, 1,100 tons of 2,240 pounds had during 1928 and therefrom to the end of the year 1931 been consumed at the Naval Fuel Depot, and 60,696 tons of 2,240 pounds had been diverted to local Government activities. The total thus failing of trans-shipment on vessels was 61,796 long tons.

At the export rate of $2.52 per ton of 2,240 pounds, the freight on this amounted to $155,725.92.

At the local rate of $2.65 per ton of 2,000 pounds, the freight would have amounted to $183,410.53, the short tons being 69,211.52.

The difference between $155,725.92 and $183,410.53 represents an undercollection by plaintiff of $27,684.61.

A part of this amount, $3,701.11, was at one time paid by defendant to the plaintiff, and then, at the direction of its Comptroller General, withheld from other amounts con-

ceded otherwise to be due the plaintiff, in an effort to reimburse the defendant for its supposed overexpenditure of $3,701.11.

The remainder, $23,983.50, has at no time been paid to the plaintiff.

4. On the inbound movements of all this coal, that is, from mine to fuel yard, freight charges were in the first instance paid to the plaintiff by agencies other than the Government.

The contractors selling the coal to the Government based their bids thereto on the export rate of $2.52 per ton of 2,240 pounds to the fuel yard.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

This is a suit for the recovery of the difference between the domestic and the export tariff rates of coal transported by the plaintiff from mines in West Virginia to the Naval Fuel Depot at Sewall's Point, Virginia.

The facts show that the Navy Department advertised for bids for the delivery of certain tons of coal at its Naval Fuel Depot, Sewall's Point, Virginia, during the years 1923, 1924, and 1927. This depot had been established in 1918 as a reserve depot for the collection and storage of coal to supply naval vessels and for domestic use. There was nothing in the advertisement for bids to show that the Navy Department contemplated the trans-shipment of this coal. The prospective bidders inquired of the plaintiff as to the tariff rate for the transportation of the coal from their mines to the point of delivery at the Naval Fuel Depot at Sewall's Point and were informed by plaintiff that the tariff rate would be $2.52 per ton of 2,240 pounds, which was the foreign rate as against $2.65 per ton of 2,000 pounds, which was the domestic rate. The defendant accepted the bids at a flat sum for the coal to be delivered at the Naval Fuel Depot without knowledge of the rates given by plaintiff to the bidders. When the coal arrived at plaintiff's Sewall's Point terminals, the owners or their agents were notified by plaintiff, and the owners or their representatives notified

the plaintiff to deliver the coal to the Naval Fuel Depot at Sewall's Point. Before or after delivery, the record is not clear as to which course was followed, the plaintiff billed the owners or their representatives for the transportation charges and were paid by the owners or their representatives. The defendant did not pay at any time any amount for the transportation of the coal. After the coal reached the Naval Fuel Depot it was dumped in the supply depot of the Government and commingled with the coal of the several contractors from whom the Government had purchased coal.

In 1929 the Navy Department decided to abandon its storage plant and to dispose of the coal then in storage. Some of it was trans-shipped beyond the Virginia Capes but some sixty-odd thousand tons were used by the Government within the Capes at its different Naval Institutions.

The plaintiff sues to recover the difference between the foreign rate of $2.52 and the domestic rate of $2.65 on the coal used within the Capes. Section 6, paragraph 7, of the Interstate Commerce Act (Title 49, U. S. C. A.), provides as follows:

> No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

The plaintiff claims that it is entitled to recover the tariff rates imposed by the Interstate Commerce Act for all tonnage of coal delivered to the defendant and not trans-shipped beyond the Capes at the domestic rate, and also the

defendant, having received the coal at its Naval Fuel Depot, was the consignee under implication of law.

There can be no question of the principle that it is unlawful for a carrier to accept less than the tariff rate as compensation for an interstate transportation of goods and that where the freight charges have not been paid by the consignor, the consignee who accepts delivery of the goods, paying the freight charges, is presumed to have understood that the lawful rate as fixed by the tariff filed with the Interstate Commerce Commission is the correct rate to be paid to the carrier, and if there is an underpayment at the time of delivery, the carrier can proceed against the consignee to collect the difference between the rate collected and the rate lawfully applicable. No agreement between the carrier and the consignee is binding which is less than the lawful rate as fixed by the tariff. The rule is that the consignee who receives the goods and pays the transportation charges which are less than the lawful rate is responsible for the difference between the amount paid and the lawful rate. This rule was laid down in *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company* v. *Fink*, 250 U. S. 576, and has been followed consistently in all other cases. The rule clearly shows that the party, consignor, or consignee, or volunteer consignee who pays the freight charges and receives delivery, is the party against whom the railroad can proceed to collect the lawful tariff rate. There is no case cited by the plaintiff that differs from this rule. See *Louisville* and *N. R. Co.* v. *Central Iron & C. Co.*, 265 U. S. 59; *New York Central & H. R. R. Co.* v. *York & Whitney Co.*, 256 U. S. 406; *Davis* v. *Timmonsville Oil Co.*, 285 Fed. 470; *Callaway* v. *Atchison, T. & S. F. Ry. Co.*, 35 Fed. (2d) 319.

It is admitted that the plaintiff knew that the coal was shipped to the contractors or their representatives as consignees and not to the defendant. All freight charges were billed to the owners of the coal or their representatives. Defendant did not pay any part of the transportation charges. No representation in the bids or the acceptances of the bids was made by defendant that this coal was to be trans-shipped beyond the Capes. Those bidding on the de-

fendant's advertisement for bids for the delivery of this coal at the Naval Fuel Depot at Sewall's Point and also the plaintiff railroad company assumed that all, or the greater bulk, of the coal delivered to the defendant would be trans-shipped in Naval vessels beyond the Capes, but there was nothing on the Government's part to justify this assumption. During these years the Government vessels were being transformed or converted from coal burners to liquid burners. This fact was known to both the owners of the coal and to the railroad company. The abandonment of the Naval Fuel Depot was due to this change.

The plaintiff admits in its brief that recovery can not be had from the actual consignees or those parties who were actually charged for the transportation of the coal, and who actually paid the transportation charges. It appears that when the coal was delivered at the Naval Fuel Depot by the several contractors with the Government, it was commingled, and it is impossible for the plaintiff to prove what proportion of the coal of each consignee was used in domestic consumption or in foreign consignment.

Plaintiff contends that when it delivered at the Naval Fuel Depot, at the request and under the orders of the consignees, the delivery was made by dumping the coal into the Naval Fuel Depot and that service constituted such an act as to make the defendant the implied consignee. We do not see any merit in this contention. The Government did not pay for this service and never undertook to pay for it. This service was rendered at the request of and as the agents of the consignees. The consignees were the ones to whom the railroad looked and from whom the railroad collected for this service. The contractors with the Government agreed to make delivery free of all transportation charges at the Government's Naval Fuel Depot. The defendant is not a consignee actually, or by construction of law, and, therefore, is not responsible for the difference in the transportation charges.

The petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

MAURICE H. SOBEL, AN INDIVIDUAL, TRADING UNDER THE FIRM NAME AND STYLE OF M. H. SOBEL COMPANY, v. THE UNITED STATES

[No. 42850. Decided December 5, 1938]

On the Proofs

Government contract.—Where plans, specifications, and statements are alleged to have led to the belief that the Government would construct a railroad track, adjacent to proposed location of hangars to be built by plaintiff, it is held that the evidence fails to show that any contract or agreement was made by the Government to construct such a railroad track, and in the absence of any agreement there can be no recovery for cost and expense incurred by reason of the defendant having failed to construct such railway.

Same.—Where soil conditions, unknown when the contract was made, rendered it necessary to change the character of the foundations, which delayed the work, it is held that this was not such a change as was contemplated by the contract, and plaintiff is entitled to recover for incidental costs and damages resulting from the delay so occasioned, although the contract price was increased to cover the increased cost of construction of the foundations and the time limit for completion of the contract was extended.

Same.—Where the contract made provision for the erection of an additional hangar, at the option of the defendant, it is held that the plaintiff cannot recover for the delay caused by the erection of such additional hangar.

Same.—Where contract called for "hydrostatic" test of the steam heating system, and it was provided that the defendant should furnish the steam for such test, but no steam was in fact furnished, and a test was made with compressed air, it is held that the plaintiff is entitled to recover for cost of repairing the system when defects developed.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. *Mr. Bynum E. Hinton* and *King & King* were on the briefs.

Mr. Herbert A. Bergson, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is, and at all times material to this proceeding was, a citizen of the United States, a resident of Detroit,

Michigan, and engaged in the business of a general contractor in construction work, trading under the firm name and style of M. H. Sobel Company, which name was and is duly registered in Wayne County, Michigan.

2. Pursuant to an invitation for bids issued by defendant May 12, 1931, and a bid made by plaintiff in response thereto on June 24, 1931, which was accepted by defendant, plaintiff and defendant entered into a contract dated July 6, 1931, for the construction of ten Air Corps hangars and related work at Langley Field, Virginia, for the lump sum of $498,000. The work to be performed was described in the contract as follows:

> The contractor shall furnish all labor and materials, and perform all work required for the construction and completion of Ten (10) A. C. Hangars c, e, f, g, h, j, k, l, n, and p, with all Annexes, Connecting Bays and Boiler Houses; Additions and Annex to Hangars a and b, at Langley Field, Virginia, in strict accordance with Item I of proposal attached hereto as "Schedule A."
>
> (All material is to be furnished by the contractor except that specifically mentioned in the specifications to be furnished by the United States Government) for the consideration of Four Hundred and Ninety-eight Thousand Dollars and no cents ($498,000.00) in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: [Then followed list of specifications, drawings, and schedules, including the schedules submitted with plaintiff's bid, all of which became a part of the contract.]

The contract provided that the work should be commenced July 6, 1931, and should be completed January 2, 1932. The standard government form of bid, which plaintiff executed and which became a part of the contract, provided that no bid would be considered which provided for more time than four months for the completion of the first three hangars after the arrival of the material to be furnished by the United States, or the completion of the entire work, in accordance with Items, I, II, and III, by January 1, 1932, and that performance should begin within 15 days after receipt of notice to proceed and be completed within 180 days from that date. The contract also provided for liquidated

damages at the rate of $15 per hangar for each day of delay until the work was completed and accepted.

The contract further provided that if the defendant elected within 60 days after the signing of the contract to award a contract for the construction of an additional hangar, known as Hangar M, plaintiff would construct this hangar at a bid price of $31,900.

In general the material to be furnished by the defendant consisted of all structural steel and steel shapes, steel windows, sash and glass, roofing, and other similar materials, and the remainder of the material was to be furnished by plaintiff, approximately one-fourth of the material (by weight) being furnished by defendant and three-fourths by plaintiff. The material to be furnished by the defendant was to be delivered by the defendant to within 200 feet of the site of each building, and plaintiff was to move the material from that place and install it in the buildings. The contract and specifications, including the invitation for bids and plaintiff's bid, are attached to the petition as Plaintiff's Exhibit A and they are incorporated herein by reference.

3. Before submitting his bid plaintiff visited the site where the work was to be done and examined the site, plans, specifications, and drawings which were furnished to plaintiff by defendant and which became part of the contract. On one of the drawings submitted to plaintiff appeared certain symbols indicating the location for a railroad track, all points on which, with one possible exception, were more than 200 feet from any of the hangars which were proposed for construction under the invitation for bids, though there was no other reference in the contract, plans, specifications, or other related papers, to the existence of such a railroad track. The railroad track outlined in the drawing had not been constructed at the time of plaintiff's examination. However, plaintiff was advised by the construction quartermaster that defendant expected to construct a permanent track ultimately at the location shown on the drawing and that pending completion of the permanent track a temporary track was to be constructed parallel with, and adjacent to, the proposed location for the hangars. The construction quar-

termaster stated further that it was hoped to have the temporary track completed in time for use in the conveying of material thereon for the construction of the hangars and that, in the event the track was completed in time, plaintiff would be permitted to use it in connection with his work under the contract, provided such use did not interfere with its use by the Government.

Defendant began work on the temporary railroad track at or before plaintiff's examination of the site and from time to time during the progress of the work extended it adjacent to, and parallel with, the hangars, but the extensions were not made in time for use in transporting the greater part of the material required by the contract, and even to the extent completed prior to the construction of some of the buildings plaintiff did not find it practical or expedient to make use thereof.

4. At the time the bids were submitted, there was an improved roadway which extended into the area where the hangars were to be constructed, together with certain lateral extensions from this roadway which led to various points within the area. These improved roadways did not, however, extend to within 200 feet of the sites of the various hangars nor as close to the hangars as the temporary railroad track as contemplated and ultimately constructed. Plaintiff was permitted to use the improved roadways and, in addition, was permitted to transport his material over the area where no improved road existed, for which purpose plaintiff maintained temporary roadways. In order to maintain these temporary roadways it was necessary for plaintiff to fill in the ruts from time to time with cinders, ashes, or similar material, some of which was made available to plaintiff on the ground without cost, and to do other general maintenance work. No men or crew of men was employed for this maintenance work but it was performed by some of plaintiff's laborers whenever required.

5. Since the material to be furnished by the defendant had been ordered for delivery in certain sequence, beginning with Hangar P, the site for which was in the north end of the construction area and nearest to the temporary railroad track

which was being built, plaintiff planned to begin work on that hangar and then to proceed with the construction of other hangars to the south thereof. However, when on July 11, 1931, plaintiff began excavating for the foundation for Hangar P an unexpected mucky soil condition was discovered. Plaintiff called this condition to the attention of the construction quartermaster who agreed with plaintiff that a different type of foundation should be considered. After the matter had been discussed for several days and after test pits had been made, plaintiff, on July 17, 1931, made a recommendation as to a type of foundation to be used wherein piles would be driven, and also submitted a price at which he would be willing to perform the work. On the same day, plaintiff called the construction quartermaster's attention to the delay which was resulting from the situation which had arisen. July 22, 1931, defendant's representative authorized plaintiff to proceed with the work in accordance with his proposal of July 17, 1931. August 13, 1931, plaintiff asked for an extension of 45 days because of the time which was being lost on account of a solution of the question which had developed with respect to the foundation for that hangar. A further letter in support of that request was sent by plaintiff to defendant September 2, 1931, which also called attention to time which was being lost due to a change which became necessary in the order of carrying out the work as shown in finding 7.

September 18, 1931, defendant issued a Change Order by which plaintiff's contract price was increased by $5,867.25, of which $3,346.40 was for the construction of piling foundations for Hangars N and P in accordance with the revised plans which had been determined upon. The Change Order also extended the date for the completion of the contract 45 days from February 12, 1932 (see finding 6 as to a previous extension), and that extension was granted because of the situation which had arisen on account of the foundations referred to in the order. Plaintiff performed the work called for by the Change Order and was paid in accordance therewith.

6. While a determination was being made of the disposition of the question referred to in finding 5, the defendant

determined to have constructed the additional hangar which was referred to in plaintiff's bid as Item II and designated as Hangar M. In order to provide for that construction a Change Order was issued September 10, 1931, increasing the contract price by $31,900 and extending the date for completion of the contract 40 days from January 2; that is, to February 12, 1932.

7. When it developed that plaintiff could not proceed immediately with the construction of Hangar P, for the reasons enumerated in finding 5, plaintiff, for the purpose of continuing with the work without delay, transported the material which had been delivered by defendant for Hangar P at the north end of the construction area to Hangar C at the south end of such area and proceeded with the construction of that hangar. Plaintiff made no charge for moving that material. The reasons for proceeding with that hangar rather than the intermediate hangars were that the material for Hangar P was entirely interchangeable with that for Hangar C, which was not entirely true with respect to all other hangars, and, in addition, a more efficient method of carrying on the work was to begin at one end and proceed to the other rather than to attempt to work from intermediate points. At the time this change in the order of proceeding was made the defendant had delivered the material for Hangar P but had not made the delivery for Hangar C. The temporary railroad track heretofore referred to had also not been extended beyond Hangar P and therefore it was necessary for plaintiff to transport the material by truck.

8. In view of the provision in the contract to the effect that the material which was to be delivered by the defendant was to be delivered within 200 feet of the site of each building, and, since the temporary railroad track was not being completed in time to move such material thereon to within the desired distance, defendant found it necessary to advertise for bids for unloading and transporting material to the locations called for in the contract. Plaintiff's proposal was accepted and a Change Order was issued pursuant to which plaintiff performed and was paid for such work. No extension of the completion date of the contract was requested by

plaintiff or made by reason of this change in the contract.

9. The contract and specifications provided that the roofing for the hangars and the connecting bays would be furnished and installed by the defendant. Prior to the submission by plaintiff of his bid on the contract defendant had advertised for bids for furnishing and installing roofs on the hangars. However, some complications developed on the part of defendant with respect to the acceptance of the bids which had been submitted, and it became necessary to readvertise for bids with the result that it was not until November 4, 1931, that the contract was awarded for furnishing and installing the roofs, plaintiff being the successful bidder. That contract provided that the work should be commenced November 4, 1931, and be completed February 12, 1932.

As plaintiff proceeded with his work he advised the construction quartermaster on August 11, 1931, as follows:

> Our schedule contemplates some hangars being ready to receive roofs within approximately thirty (30) days. Our schedule further calls, particularly because of the probable sudden changes of weather in this locality from fair to rain and stormy, that cement floors in hangars be poured after roof is in place. This for self-evident reasons.
>
> In view of the above, we suggest that contractors who are to furnish and install the A. P. M. roofing be notified accordingly, and an expression be obtained from them as to whether and when they will be ready to start.

However, because of the delay in awarding the contract for the roofs, no roofs were installed until after the execution of the contract of November 4, 1931, heretofore referred to, and some time elapsed after November 4, 1931, before plaintiff could procure the roofs and begin installation under his new contract. Because of the probability of rain and storms in the fall of the year, plaintiff could not safely pour and complete the monolithic concrete floors, and likewise could not proceed satisfactorily with the plastering, plumbing, painting, and other portions of the interior work until the roofs were installed.

When it appeared that the roofs would not be furnished at the time originally contemplated, plaintiff decreased the

number of laborers and workmen on the job and otherwise slowed down the progress of his work, but even by proceeding at a slower rate, plaintiff had three of the hangars ready for the roofs by October 3, 1931, and an additional two by October 18, 1931, and a further additional two by November 3, 1931. As a result of such delay in furnishing the roofs, plaintiff was required to keep his equipment, superintendent, foremen, and other straight-time employes on the work longer than would have been necessary except for such delay.

10. Under the contract plaintiff was required to construct boiler houses in which the heating plant was to be installed, the boilers and other equipment therein being furnished and installed by defendant. The original plans and specifications did not furnish certain detailed information as to size and type of equipment to be installed in the boiler houses, and certain other pertinent information with respect thereto, some of which information was necessary in order to enable plaintiff to proceed with the construction of the boiler houses. About July 28, 1931, plaintiff submitted to defendant for approval certain drawings and information in connection with the construction of the boiler houses. From time to time until January 1932, plaintiff made oral requests of defendant's representative for information with respect to the equipment to be installed in the boiler houses but such information was not supplied until about January 6, 1932, and plaintiff wrote defendant on January 8, 1932, as follows:

> The final approval of steel drawings and information for boiler houses, which were originally submitted on July 28, 1931, only received by our field office on the 6th instant.
>
> We wish herewith to place ourselves on record that this delay of approval of these drawings as well as the late date of obtaining information for same is subject to delay final completion date of our Hangar contract, of which these boiler houses are a part. We are not at the present moment prepared to state the number of extra days we may require, but will advise you as soon as we have an opportunity to check the same.

February 19, 1932, defendant issued a Stop Order which read in part as follows:

* * * you are directed to stop work on the boiler houses and heating lines for the hangars. This is necessitated as result of incomplete condition of heat distribution system. The boilers which are too large for the openings, will not arrive for three weeks or a month and must be carried through openings left in the brick work. The covering and painting of heat pipes cannot be done until the heat has been turned on. The progress of this work is dependent upon approval of plans which are now in the Office of The Quartermaster General. Upon approval of these, a definite date for resumption of work can be set and a notice to proceed will be issued to you.

In reply to that Stop Order plaintiff advised defendant February 22, 1932, as follows:

> With reference to Stop Order under date of February 19, 1932, which we have this date received, in connection with boiler houses which are part of our Hangar contract at Langley Field, Virginia, we wish to state that we propose to be governed accordingly.
>
> We do, however, wish to ask that this Stop Order being no fault of ours and the amount of work that may be left undone until resumed is so small in comparison to our total contract, that when all other work on this contract, except what is involved in the above referred to Stop Order, is completed that you accept these buildings with that particular exception and issue vouchers to us for payment for all the work, except for such amount to be held back as may in your opinion be necessary to safeguard the Government as to our completion of such work involved.

That Stop Order remained in effect until March 18, 1932, when defendant issued a Notice to Proceed which, in its concluding paragraph, stated:

> Stop Order, dated February 19, 1932, and Notice to Proceed with work have delayed completion of the contract twenty-eight (28) calendar days from March 28, 1932, making the new date of completion April 25, 1932.

11. Among the items of material to be furnished by defendant was certain glass to be used in the buildings, which glass was to be installed by plaintiff. Practically all of this glass was furnished by defendant as needed by plaintiff, but on January 22, 1932, plaintiff advised defendant

that a small amount of glass, approximately 2 per cent of the total required, had not been furnished, and requested that it be supplied at defendant's earliest convenience. The glass was furnished by defendant the latter part of March 1932. This caused some delay, but the evidence fails to show whether this delay was in any substantial amount.

12. In September 1931, the question arose as to whether plaintiff was required under the contract to furnish certain plumbing fixtures or whether such fixtures were to be furnished by the defendant, and that matter was not settled until about January or February 1932, at which time it was decided that the fixtures would be furnished by defendant and installed by plaintiff. Because of other delays it was not necessary to furnish this equipment until about March 1932. The fixtures were furnished by defendant to plaintiff in May 1932. The failure of the defendant to furnish that equipment earlier delayed plaintiff to some extent in the completion of his contract.

13. Plaintiff had on hand the following equipment with a rental value as shown:

Equipment:	*Reasonable Rental value*
4 Concrete Mixers	$125 each per month.
1½-ton Truck	3 per day.
1 Gasoline Portable Sawmill	75 per month.
2 Power Pumps and Some Hand Pumps	25 per month for all pumps.
350 Rooshores	1 per month per unit, i. e., $350 per month for all of this equipment.
Small Tools	300 per month.

Plaintiff had the following employes, who were paid on a straight-time or salary basis:

Superintendent	$85 per week.
Clerk	35 " "
General Carpenter Foreman	60 " "
General Labor Foreman	50 " "
Tool Room Man	20 " "
Maintenance Man	35 " "

The general carpenter foreman finished his work on, and was released from, the job about March 15, 1932; the tool room man about March 26, 1932; the general labor foreman

about April 2, 1932; and the superintendent about April 5, 1932.

14. Except for delays heretofore mentioned which were attributable to defendant, plaintiff would have completed the contract 90 days sooner than the contract was completed. Because of such delays plaintiff incurred additional costs for salaries paid straight-time employes for that additional length of time, of $3,664.29, and the reasonable rental value of plaintiff's equipment which was kept on the job for that time was $4,020.

15. One of the provisions of the contract was that plaintiff should install the heating equipment in the various buildings, which heating equipment consisted, among other things, of steam pipes, radiators, etc., the general scope of the work being described in the specifications as follows:

> This section of the specification consists in furnishing all labor and materials necessary to install complete in every detail a vacuum return steam heating system, using steam supplied by a central heating plant as hereinafter specified or indicated on the plans. The heating system shall be delivered complete in perfect working order, in full accordance with the intent and meaning of this specification, and to the satisfaction of the C. Q. M.

The central heating plant, including the boilers referred to, was to be installed by the defendant. The specifications further provided as to tests and guarantee as follows:

> *Tests.*—Before any covering is installed the entire heating system shall be given a hydrostatic test and proven tight under a gauge pressure of thirty (30) pounds per square inch, after which a regular working test covering not less than three (3) hours shall be made. The contractor shall furnish all instruments and labor, the U. S. will furnish the steam. The system shall show a free and equal circulation of steam to each radiator and unit heater in the building. To accomplish this result the radiator valves shall be adjusted, if necessary, after which this adjustment shall be made permanent by the locking device.
>
> *Guarantee.*—The contractor shall guarantee all material and equipment to be free from defects for a period of one (1) year from date of acceptance and

shall replace any part or parts free of charge found to be defective in material or workmanship within the period of guarantee.

16. Plaintiff installed the heating system, including the radiators and pipes, and in April or May, 1932, before coverings were placed on the pipes, made a compressed-air test and tightened certain of the joints but did not make a hydrostatic test. At that time defendant had not made steam available in the heating system but steam was not required in order to make a hydrostatic test.

Defendant accepted the buildings at various times during the first half of 1932, the last building being accepted about June 6, 1932. When the steam was turned on in the heating system, about October 1932, by defendant after plaintiff had left the job, certain leaks developed in the heating system which plaintiff had installed. Some of these leaks were due to cracks which occurred in the pipes and joints due to expansion, since inadequate provision had been made by plaintiff for expansion when plaintiff carried out his work.

When the leaks and cracks in the system were discovered defendant notified plaintiff by letter dated October 7, 1932, as follows:

> This office wishes to advise you that a test was recently made on the heating equipment in the Hangars, and upon making this test it was found that the piping and equipment furnished under your contract have shown a number of defects which must be corrected. The attached list shows those defects which existed at the time of the test.
>
> There have also been several complaints in regard to the heating plants in the Six Single and Four Double Company Officers' Quarters constructed by you under Contract No. W-6174-qm-65. Upon investigation it was found that in all of these quarters the furnaces had been shimmed up to level them, but the crack between the base and the floor had never been grouted, leaving a draft on the boiler at all times. In several of the sets the Honeywell regulating equipment attached to these plants is not working satisfactorily. The limit switch in some of the regulating motors fails to operate and the motor will stop only in one position. These defects must also be corrected.

> This office desires that you make arrangements to correct these defects at the earliest possible date as the heating season is at hand.

At that time plaintiff had left the job and it became necessary for him to send a man from Detroit to the location of the work and make the necessary examination and arrange for making the repairs. Plaintiff made the repairs under protest at a cost of $800.

17. In the construction of the hangars a large amount of water was required in connection with the concrete and brick work, particularly the footings and floors. In order to supply this water plaintiff had installed temporary water lines, consisting of iron pipes laid on the surface of the ground about 2,000 feet long with risers at frequent places permitting connections to the water lines. Had it not been for the delays heretofore referred to, plaintiff could have completed the work, to the extent that water was required from these water lines, prior to the time when it would have been necessary to protect these lines from freezing. However, because of the delays and when it became apparent that the lines would be required after the time when freezing could reasonably be expected, plaintiff excavated trenches 18 inches deep and buried the temporary line. The reasonable value of excavating for, and burying, temporary water lines and removing the water lines after completion of the work was 25 cents per lineal foot for 2,000 feet, a total of $500.

18. The drawings forming a part of the contract showed that the gable ends of the hangars were to be constructed of stucco applied to metal laths, and the upper portion of the corners of the hangars at the side of the gable ends was to be constructed in a similar manner. When the plaintiff began the construction of the gables and the corners he discovered that defendant had failed to furnish certain required structural steel for construction of these parts in the manner described above, and that no structural steel therefor was provided for in the drawings furnished by defendant. Plaintiff called this matter to the attention of the construction quartermaster, who advised plaintiff that the corners should be built of brick. Plaintiff protested against being required to carry out the construction in this manner, which

was not provided for in the specifications and drawings, but after the protests were heard by the Quartermaster General in Washington, plaintiff was ordered to build the corners of brick and stucco over the brick walls. Plaintiff advised defendant's representatives that he would perform the work in accordance with their instructions in order not to further delay the job but that he expected pay for the same on a unit-price basis.

The protest by plaintiff and decisions by defendant's representatives were oral and no Change Order was ever issued. Plaintiff completed the work as required. The reasonable value of the additional work was $1,320.

19. In addition to the Change Order issued September 10, 1931, referred to in finding 6, which extended the date of completion 40 days from January 2, 1932, to February 12, 1932; the Change Order issued September 18, 1931, referred to in finding 5, which extended the date of completion 45 days from February 12, 1932, to March 28, 1932, and the Stop Order of February 19, 1932, and Notice to Proceed of March 18, 1932, which extended the date of completion 28 days from March 28, 1932, to April 25, 1932, the defendant issued other orders extending the date of completion as follows: April 18, 1932, defendant issued a Stop Order which directed plaintiff to stop work on the contract and further stated:

> * * * This is necessitated because of non-delivery of material which is yet to be furnished by the Government for the completion of the hangars. On the arrival of this material a Notice to Proceed with work will be issued you.

That Stop Order remained in effect until June 1, 1932, at which time defendant directed plaintiff to proceed with the work and at the same time notified plaintiff of an extension of time 44 days for the completion of the contract, making the new date of completion June 8, 1932. The last paragraph of that Notice to Proceed read as follows:

> Stop Order, dated April 18, 1932, and Notice to Proceed with work have delayed completion of the contract forty-four (44) calendar days from April 25, 1932, making the new date of completion June 8, 1932.

In accepting the extension of time to June 8, 1932, plaintiff stated that he was accepting the order with the understanding that such acceptance would not prejudice his rights in whatever claims he might have against the defendant for delays incurred by defendant in the completion of the contract. The contract was completed by plaintiff June 6, 1932. The total period of time covered by the several extensions referred to above was 157 days, that is, from January 2, 1932, to June 8, 1932.

20. Prior to the completion of the contract plaintiff made oral complaint to defendant's representatives of delays which plaintiff contended had occurred through no fault of plaintiff, and stated that plaintiff expected to be reimbursed for the additional expense occasioned by such delays. On April 20, 1932, plaintiff wrote defendant as follows:

> We herewith wish to place ourselves on record that we have been put to considerable expense by the Government, and through no fault of ours, in the execution and completion of contract number W 6174–qm 45 together with its various extra work orders for Hangars at Langley Field, Virginia, because of continuous and repeated delays caused by the Government.
>
> We expect to be reimbursed for the actual expenses so incurred by us because of these delays and propose to file a claim on same upon final completion and acceptance of this job, at which time we will be in a position to compute the actual amount so involved.

Plaintiff wrote defendant to a similar effect May 13, 1932.

December 22, 1932, plaintiff filed formal claim with defendant asking for additional payment on account of the several items involved in this suit. When plaintiff failed to receive a reply he wrote to the War Department and was advised that the matter had been referred to Langley Field for additional information and plaintiff would be advised later as to action thereon. Several months later, upon inquiry, he was advised by the War Department that the claim had been referred to the Comptroller General. Plaintiff never received any notice of any action upon the claim by the War Department but was advised by the Comptroller General September 1, 1933, that the entire claim was denied.

No payment has been received by plaintiff on account of any of the items involved in this suit.

21. A reasonable allowance for overhead on the work done in burying and removing water pipes, as set forth in Finding 17, is 15 per cent. A reasonable allowance for overhead on the work done in building corners, as described in Finding 18, would be at least 10 per cent.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff brings this action to recover for alleged breaches of a contract made for the construction of several hangars and work in connection therewith at Langley Field, Virginia. The material parts of the contract are set out in Finding 2.

The contract provided that the defendant was to furnish the contractor part of the materials and plaintiff the remainder. The plaintiff claims that he was led to believe by the plans, specifications and statements made by the construction quartermaster that a railroad track would be constructed parallel with and adjacent to the proposed location for the hangars and that this constituted one of the considerations for the contract. The evidence, however, fails to show that any contract or agreement was made by defendant to construct such a railroad track. In the absence of any agreement, the plaintiff can not recover for cost and expense incurred by reason of the defendant having failed to construct such a railway and the claim of the plaintiff for damage on this account is rejected.

Another claim made by plaintiff is on account of delays alleged to have been sustained by reason of a change order with reference to the foundations.

The contract showed the elevation to which the excavations for the foundations were to be extended. Shortly after plaintiff began the excavations it was discovered that the soil was unsuitable for sustaining the foundations and the matter being called to the attention of the defendant, it was ordered by the latter that the foundation at Hangar P be

placed upon piles. The defendant also issued a change order by which plaintiff's contract price was increased by $5,867.25, of which $3,346.40 was for the construction of piling foundations for Hangars N and P in accordance with revised plans which had been determined. The construction of the pile foundations delayed the work and the change order extended the date for completion forty-five days.

The defendant contends that as the right to make changes was stipulated in the contract and the plaintiff accepted the change order, the price then fixed for the work was full compensation for making the changes and in the absence of a showing that the Government delayed the work required to make the changes plantiff can not recover his incidental costs and damages resulting from the delay occasioned. But we do not think the change made necessary by soil conditions, unknown when the contract was made, was such a change as was contemplated by the contract. The case is almost exactly similar to that of *Rust Engineering Co.* v. *United States*, 86 C. Cls. 461, 475, wherein it was said that—

> The changes made necessary by reason of the conditions encountered in excavating for the foundation of the building were not reasonable changes within the scope of the drawings and specifications as contemplated in Art. 3 of the contract, but represented important changes based upon changed conditions which were unknown and materially different from those shown on the drawings or indicated in the specifications.

And it was held that the plaintiff therein might recover the extra cost directly attributable to the delay caused by the change order.

Also in *Levering & Garrigues Co.* v. *United States*, 73 C. Cls. 566, 577, it was said:

> The act of the contracting officer in granting the plaintiff an extension of time in which to complete the contract equal to the delay caused by the Government does not relieve the defendant from liability to the plaintiff for losses sustained by it by reason of such delay. [Citing] *Crook Co.* v. *United States*, 59 C. Cls. 348; *William Cramp & Sons* v. *United States*, 41 C. Cls. 164.

Following the rule laid down in these cases, we hold that the plaintiff is entitled to recover on the item last considered.

It is conceded that defendant delayed in furnishing the roofs, but it is argued that there was no obligation to furnish the roofs earlier than it did and that plaintiff was not damaged by defendant's delays in this respect. We do not agree, and hold that plaintiff is also entitled to recover on this item.

Without reviewing the evidence, which is fully set out in the findings of fact, we hold that the plaintiff is entitled to recover on account of delays caused by the defendant in the completion of the boiler houses.

Defendant also delayed in furnishing the glass, but we concur in the findings of fact made by our commissioner that the extent of such delay was so small as to be negligible.

Finding 12 shows that the plaintiff was also delayed by the failure of defendant to furnish the plumbing fixtures.

Owing to the fact that these delays to some extent overlapped, the total amount which the plaintiff was delayed through the fault of defendant can not be exactly fixed. The plaintiff makes claim for a total of 140 days' delay, but the plaintiff can not be allowed for the delay caused by the construction of an additional hangar for the reason that the contract made provision for its erection at the option of the defendant. Plaintiff claims 40 days' delay in this respect but whatever delay might have been caused by reason of this addition to the work was not attributable to the defendant but caused by the contract. Upon consideration of all of the evidence we concur in the report of our commissioner that the total amount of delay attributable to defendant was approximately 90 days, and that by reason of these delays plaintiff incurred additional cost for salaries paid straight-time employees of $3,664.29, during this addition to the time necessary for the completion of the contract, and that the reasonable rental value of plaintiff's equipment which was kept on the job for that time was $4,020.

Plaintiff asks for overhead and profit on the items mentioned in the preceding paragraph, but we think that these

items are matters of expense upon which plaintiff is not entitled to profit except as it is included in the cost of the work and that any additional overhead will be covered by the cost of salaries and the rental value of plaintiff's equipment. Plaintiff's claim in this respect is therefore rejected.

Plaintiff's claim for damages on account of repairing the heating lines presents a more difficult question. The contract required plaintiff to install complete a vacuum return steam heating system and that all pipe be so installed that it might contract or expand freely without damage to any other work or injury to itself, and provided that the contractor should make a hydrostatic test of the steam pipe and that "the U. S. will furnish the steam." The contractor did not make a hydrostatic test but did make a test with compressed air. After the plant was turned over to the defendant and the steam was turned on, the expansion caused by the heat of the steam resulted in a number of cracks in the joints or pipes and consequent leakage. Defendant required plaintiff to repair this damage, which it did, and plaintiff now seeks to recover the cost thereof, but defendant insists that as plaintiff did not make any hydrostatic or steam tests he can not recover on this item. Plaintiff replies that defendant furnished no steam with which to make the test provided by the contract.

A proper test of the pipes and joints could not be made without steam. A hydrostatic test being made with cool pipes, like the compressed air test, would result in the joints being screwed up too tight and breakage would follow when steam was turned on. The defendant was not prejudiced by the failure to apply a hydrostatic test. Breakage could only be avoided by the use of steam. We think it may be presumed that if steam had been furnished the plaintiff would have pursued the ordinary and natural course of not tightening the joints completely until the heat had been fully applied and if this was done there would have been no breakage. The defendant did not furnish steam, although the contract expressly provided it should do so, and it appears to us that the failure of the defendant to furnish steam for a proper test was the primary cause of the damage

which resulted. Plaintiff was required to repair the piping system and did this at a cost of $800 which we think he is entitled to recover.

It should be noted in this connection that the provision in the contract that the defendant was to furnish the steam follows immediately after the provision for the hydrostatic test and it is a question whether, as the contract is drawn, the words "hydrostatic test" were not intended to refer to "steam test" although a hydrostatic test is made with water.

In Finding 17 we have adopted the report of our commissioner which shows that delays caused by defendant made it necessary to bury certain water lines described in the finding, and the cost of the work and their removal after its completion was $500. In this finding, we concur.

Finding 18, taken from the commissioner's report, shows that the reasonable value of work done in constructing brick corners for the hangars [which were not covered by the contract or specifications but required by the defendant] was $1,320.

The evidence shows that reasonable overhead on a small job done in connection with the pipe lines, at a time when other work was not going on, was 15 per cent. There is no direct evidence as to the overhead on the other items of work which we have found plaintiff entitled to recover, but it evidently would be less and we think it would be at least 10 per cent and have so found. Profit would be included in the reasonable value of the work and perhaps overhead also, but we have not included overhead in our estimate of the value of the extra work for which plaintiff is entitled to recover, and therefore make an allowance to plaintiff of an additional sum of 15 per cent on the value of the work done in connection with the pipe lines and 10 per cent on the value of the work done in constructing the brick corners.

In accordance with what has been said above, we conclude that the plaintiff is entitled to recover on account of delays caused by defendant the items of $3,664.29 and $4,020 as specified in Finding 14; the item of $800 on account of repairs to the heating system as specified in Finding 16; also the item of $500 specified in Finding 17; and $1,320 specified in Finding 18. To the item of $500 there should

be added 15 percent for overhead and to the item of $1,320 10 per cent for overhead. With these additions the total allowed plaintiff is $10,511.29.

Judgment accordingly will be awarded plaintiff for $10,511.29. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

DAVID H. SMITH v. THE UNITED STATES

[No. 43195. Decided December 5, 1938]

On Demurrer

Gold coin; just compensation; damages.—Decided on the authority of *Nortz* v. *United States*, 294 U. S. 317, 328, and *Perry* v. *United States*, 294 U. S. 330.

Mr. Seth W. Richardson for the plaintiff. *Davies, Richberg, Beebe, Busick & Richardson* were on the brief.

Messrs. Harry LeRoy Jones and *Enoch E. Ellison*, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The facts sufficiently appear from the court's opinion.

GREEN, *Judge*, delivered the opinion of the court:

This case is submitted on a demurrer to the petition, which is in two counts, but the second count is now abandoned. The material allegations of the first count are:

That plaintiff is a citizen of the United States and has for several years been engaged in the purchase and sale of investments and properties situated in Canada. That it was necessary for the operation of such business that plaintiff should have available a large amount of gold, either in legal coin or bullion, and that for the purpose of carrying on this business, plaintiff acquired in the United States during the year 1932, $80,000 in gold coin of the United States, of which he had entire control, possession, and ownership up to March 10, 1933, which gold coin plaintiff intended to take

from the United States to the Province of Ontario, Canada, for use in his business.

That on March 10, 1933, the Government of the United States placed an embargo on gold, ordered the cessation of bank disbursements of gold, and ordered and directed plaintiff and all other citizens of the United States to deliver up to the Government of the United States all gold and gold coin of the United States in excess of the sum of $100 which was in their possession and receive in return therefor from the United States Government bank notes for the gold coin thus surrendered.

That thereafter and because of the demands and requirements of the United States and to avoid the fine and imprisonment threatened by the United States, plaintiff, between the dates of March 10, 1933, and April 14, 1933, was forced to and did surrender and deliver to the United States, through banks which were its designated representatives, the sum of $80,000 in gold coin of the United States and received from these banks notes of the United States in the face amount of $80,000.

Thereafter, in order to carry on and operate plaintiff's business, as aforesaid, it became necessary for the plaintiff to purchase from the Royal Mint of Canada approximately 3,616 ounces of gold at a cost to plaintiff of $113,249.11. That the gold theretofore delivered by plaintiff to the United States amounted to 3,870 ounces for which the United States allowed plaintiff only $20.67 per ounce, although the market value thereof was in excess of $31 per ounce, and to replace it in Canada cost plaintiff $31.31 per ounce which was the regular market cost and value of gold in the open market both in Canada and the United States at the time of such purchase.

Plaintiff has demanded from defendant the additional sum of $33,249.11, being the difference between the value of the gold which he delivered to the defendant and the cost of replacing it as above stated, which demand has been refused by defendant and plaintiff has never been compensated in any way for the loss which he sustained by reason of the acts of the defendant, as above stated. Wherefore, the plaintiff asks judgment against the defendant for $33,249.11.

Opinion of the Court

We think the question involved in the case has been so well settled by previous Supreme Court decisions that no elaborate discussion is necessary.

The plaintiff's petition asks for recovery on the ground that he has not received just compensation for the gold which the Government took over. Obviously, he is not entitled to compensation unless he has been damaged in some way by the action of the defendant and the action therefore is one for damages.

It will be seen from the allegations in the petition that the damages alleged to have been sustained resulted from the inability of plaintiff, under the laws of the United States, to keep the gold which he originally possessed and use it in his Canadian business. In the case of *Nortz* v. *United States*, 294 U. S. 317, 328, the plaintiff did not deny and the court assumed "that the Congress had authority 'to compel all residents of this country to deliver unto the Government all gold bullion, gold coins, and gold certificates in their possession.' These powers could not be successfully challenged." [Citing a number of cases.] If Congress had this power, it could lawfully exercise it, and plaintiff could not properly claim any damage from such action.

In the *Nortz case*, *supra*, the plaintiff sought to recover damages by reason of the refusal of the Government to deliver him gold to the amount specified in certain gold certificates which he held and the court said:

> Had plaintiff received gold coin for his certificates, he would not have been able, in view of the legislative inhibition, to export it or deal in it.

So also in the instant case, if plaintiff had been permitted to keep his gold instead of being required to deliver it up, he would not have been able to export it to Canada or deal with it in any way.

The case of *Perry* v. *United States*, 294 U. S. 330, was one in which the plaintiff brought suit as owner of a bond issued by defendant which provided:

> The principal and interest hereof are payable in United States gold coin of the present standard of value.

Syllabus

Upon the question of whether the plaintiff had sustained any damage by reason of the refusal of the Government to pay the face amount of the bond in gold coin, the Supreme Court said (p. 356):

> There can be no serious doubt that the power to coin money includes the power to prevent its outflow from the country of its origin.

And on the following page of the opinion, the court said:

> In considering what damages, if any, the plaintiff has sustained by the alleged breach of his bond, it is hence inadmissible to assume that he was entitled to obtain gold coin for recourse to foreign markets, or for dealings in foreign exchange, or for other purposes contrary to the control over gold coin which the Congress had the power to exert, and had exerted, in its monetary regulation.

See also *Blanchard* v. *United States*, 86 C. Cls. 585, a quite similar case.

Following the rule laid down in these cases, we are constrained to hold that the plaintiff has sustained no damage by reason of being compelled to deliver up his gold under the circumstances described in the petition.

The demurrer must be sustained and the plaintiff's petition dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAM C. PORTER v. THE UNITED STATES

[No. 43553. Decided December 5, 1938]

On the Proofs

Rental allowance; army officer on duty in Canal Zone.—Where an officer of the Medical Corps, U. S. Army, assigned to duty with the Governor of the Panama Canal, as physician in the Health Department, was reimbursed the amount he was required to pay for rental of quarters owned by and controlled by the Panama Canal, he is not entitled under the Act of April 9, 1935, to recover an additional amount as rental allowances.

The Reporter's statement of the case:

Ansell & Ansell for the plaintiff. *Mr. Mahlon C. Masterson* was on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. William C. Porter, plaintiff, accepted appointment as first lieutenant, Medical Corps, U. S. Army, on October 11, 1918, to rank from September 12, 1918. On August 22, 1919, he accepted appointment as captain, Medical Corps, U. S. Army, to rank from August 19, 1919. On September 14, 1920, plaintiff vacated the latter appointment by accepting his appointment as captain, Medical Corps, Regular Army. On September 6, 1929, he was promoted to major. On September 6, 1937, he was promoted to the grade of lieutenant colonel, with which rank he is now serving on active duty.

2. On October 17, 1934, by order of the Secretary of War, plaintiff was relieved from assignment and duty at Letterman General Hospital, Presidio of San Francisco, California, and directed to proceed to the Canal Zone and upon arrival there to report to the Governor for assignment to duty.

Pursuant to orders, plaintiff sailed from San Francisco on January 26, 1935. He arrived in Panama on February 5, 1935, on which day he reported to the Governor for assignment and duty. He was instructed by the Governor to report to the Superintendent of the Gorgas Hospital for duty.

3. Gorgas Hospital is under the sole jurisdiction, supervision, and control of the Panama Canal. The Governor of the Panama Canal is the head of the civil government of the Panama Canal. He is the administrative head of the hospital and all other agencies of the Panama Canal. The civil administration is entirely separate from the military or naval administration.

4. Plaintiff reported to the Superintendent of the Gorgas Hospital and was assigned to duty in the hospital as a physician, Health Department, the Panama Canal. The position to which plaintiff was so assigned is a civil position, with a

civil rating, under the Panama Canal organization. The duties assigned to plaintiff were the same as those of purely civil physicians of like designation employed by the Health Department of the Panama Canal. His duties were performed without military uniform and without military designation or rank. Plaintiff was in the same status as physicians employed in the hospital who at no time had connection with the military or naval service. The Panama Canal organization issued to plaintiff a metal check number, identifying him as such employee, the same as was issued to all other Panama Canal employees.

Major Porter, while detailed as a physician at Gorgas Hospital, Canal Zone, was under the control of the Governor of the Canal Zone and of the Superintendent of the Gorgas Hospital for professional work only. For all other purposes, including military administration and discipline, he was under the control of the Commanding General, Panama Canal Department.

Plaintiff is a psychiatrist. At the time he was relieved from duty at the Letterman General Hospital he was due to perform a tour of foreign service. However, at that time the services of a psychiatrist were needed at the Gorgas Hospital and, therefore, he was ordered to the Canal Zone, and the Governor assigned him to such duty at the Gorgas Hospital.

5. On August 21, 1936, by order of the Secretary of War, plaintiff was "relieved from his present assignment and duty with the Governor, the Panama Canal, Canal Zone, effective upon completion of his present tour of foreign service," and was directed to return to the United States upon the first available transport and proceed to Fort Slocum, New York, where he was assigned to duty. However, plaintiff actually continued his duties in the Canal Zone until November 6, 1936, when he left the Canal Zone on leave of absence granted by the Executive Secretary of the Panama Canal, by direction of the Governor, Panama Canal, dated November 4, 1936. On January 25, 1937, he was relieved from duty in the Panama Canal.

6. During the period plaintiff served at Gorgas Hospital he had a wife and a minor son. His dependents did not accompany him to the Canal Zone, but arrived there in June

1935. Plaintiff was not assigned quarters by the Panama Canal until July 4, 1935, but occupied one room which he rented from another Panama Canal employee, who got permission from the Governor to rent him the room. During this period plaintiff received rental allowance at the rate of $100 per month (less 5 percent deducted on account of Economy Act), which was the rate authorized by law for an officer of his rank with dependents.

7. On May 31, 1935, plaintiff made application in writing for the assignment of quarters. On June 18, 1935, he was assigned quarters No. 212–B at Ancon, Canal Zone, which were occupied by him and his dependents until November 6, 1936. His quarters consisted of one-half of a duplex house with three small bedrooms, a living room and dining room, kitchen and bath. The assignment of quarters was made by the district quartermaster of the Panama Canal, who was a civil employee of the Panama Canal. These quarters were under the jurisdiction of and owned and controlled exclusively by the Panama Canal. Army officers had no authority or jurisdiction over said quarters, and they did not inspect them either as to adequacy or for any other reason. By regulation of the Health Department of the Panama Canal, plaintiff was not permitted to live outside the Canal Zone, but was compelled to live in the Canal Zone in quarters owned and controlled by and under the jurisdiction of the Panama Canal. At the time of his assignment and during his occupancy of these quarters, plaintiff made no objection to them.

8. During the period from July 5, 1935, to June 30, 1936, plaintiff was required to and did pay to the Collector of the Panama Canal a total sum of $515.24 on account of rental of quarters, water, care of grounds, rental of electric range and heater, drayage and repairs to furniture, light bulbs, and electric current, which amount was certified by the Comptroller of the Panama Canal to the finance officer of the Army, in the Canal Zone. He was reimbursed rental allowances by the Finance Officer, United States Army, in the sum of $515.24, from which there was suspended and recovered from him the sum of $50.11, on account of drayage and excess electricity, as a result of which plaintiff was actually

paid on account of rental allowances for the period the sum of $465.13.

9. Plaintiff claims the difference between the rental allowances authorized by law for an officer of his rank, with dependents, and the amount actually reimbursed to him by the Finance Officer of the United States Army, for the period from July 5, 1935, to June 30, 1936.

Should the Court hold that plaintiff is entitled to the full rental allowances authorized for an officer of his grade, with dependents, notwithstanding the limitation contained in the Act of April 9, 1935, for the period from July 5, 1935, to June 30, 1936, there would be due him the sum of $721.54—the difference between the sum of $1,186.67 and the net amount of $465.13, which he received on account of rental while occupying public quarters at Gorgas Hospital.

The court decided that the plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff, Lieutenant Colonel William C. Porter, of the Medical Corps, United States Army, sues to recover rental allowances while detailed to duty at the Gorgas Hospital, Canal Zone, for the period July 5, 1935, to June 30, 1936.

On October 17, 1934, the Secretary of War directed the plaintiff to proceed to the Canal Zone and report to the Governor for assignment to duty. He reported to the Governor on February 5, 1935, and was instructed by him to report to the Superintendent of the Gorgas Hospital for duty. The plaintiff reported to the Superintendent of the hospital and was assigned to duty as a physician in the Health Department of the Panama Canal. While detailed at the hospital plaintiff was under the control of the Governor of the Canal Zone and the superintendent of the hospital for professional work only. For all other purposes, including military administration and discipline, he was under the control of the Commanding General of the Panama Canal Department.

During the period of the claim plaintiff had a wife and minor son who arrived in the Canal Zone in June 1935. Plaintiff requested an assignment to quarters and on June 18, 1935, he was assigned quarters at Ancon, Canal Zone, which were occupied by him and his dependents throughout the period of the claim. These quarters were under the jurisdiction of, and owned and controlled by the Panama Canal. They were not under the authority or jurisdiction of Army officers. The plaintiff at no time while occupying these quarters made objection as to their adequacy.

During the time these quarters were occupied by the plaintiff and his dependents, he paid to the collector of the Panama Canal a rental of $515.24, which included charges for water, care of grounds, use of electric range and heater, drayage and repairs to furniture, and electric current. He was thereafter reimbursed that amount by the Finance Officer of the United States Army. Subsequently, he was required to repay the sum of $50.11 for drayage and excess electricity. This resulted in plaintiff receiving the sum of $465.13 on account of rental allowances during the period.

The defendant contends that plaintiff is not entitled to recover because of the provisions of the act of April 26, 1934, making appropriations for the War Department for the fiscal year ending June 30, 1935, 48 Stat. 614, 618, which reads as follows:

> no rental allowance shall accrue to any officer of the Government in consequence of the provisions found in section 10, title 37, United States Code, while occupying quarters at his permanent station not under the jurisdiction of the service in which serving but which belong to the Government of the United States, * * * in excess of the rental rate charged for such quarters * * *.

This provision was reenacted in the act of April 9, 1935, 49 Stat. 120, 124, making appropriations for the War Department for the fiscal year ending June 30, 1936, which covers the period of plaintiff's claim.

The report of the Committee on Military Affairs of the House of Representatives on the War Department appro-

priation bill for the fiscal year ending June 30, 1935 (Rept. No. 869, accompanying H. R. 8471, 73d Congress, 2d Session), explained the purposes of the foregoing proviso as follows:

> On page 12 of the bill a new provision appears directed against officers on duty in the Canal Zone occupying quarters the property of the Government or the Government-owned Panama Railroad Co. The committee is advised that there are a number of instances where officers are occupying such quarters, to the exclusion of Canal employees, at a very nominal rental and at the same time continue to draw from the Government their full rental allowances because the quarters are not "assigned" in the ordinary sense. Officers assigned public quarters are not entitled to an allowance for quarters. If officers wish to continue in occupancy of quarters such as here referred to, they should be required to forfeit their rental allowance.

Plaintiff contends that the proviso in the act of April 9, 1935, *supra*, did not apply to him while he was assigned to duty with the Governor of the Panama Canal and occupying quarters under the jurisdiction of the Panama Canal because he was an employee of the Panama Canal and while occupying such quarters he was entitled to rental allowances.

The proviso is plain and unambiguous. Its purpose was to reduce the rate fixed for rental allowances in section 2 of the act of May 31, 1924 (43 Stat. 250), to an amount sufficient to pay the rental rate charged for public quarters in the Panama Canal Zone, which were owned by the United States. It was intended to treat all officers detailed to duty in the Panama Canal as though they were assigned public quarters by the service in which they were commissioned and serving and to reimburse them the amount charged as rental of the quarters they would have been furnished without cost had such quarters been under the jurisdiction of and assigned for their occupancy by the service in which they were commissioned and serving.

The fact that plaintiff during the period of the claim was serving in the Army, occupying public quarters which were not under the control and jurisdiction of the service (Army) in which he was serving brings him squarely within the

Syllabus

scope of the proviso in the act of April 9, 1935, and precludes his right to recover.

In the light of the proviso limiting the payment of rental allowances, plaintiff was actually furnished without cost public quarters for the occupancy of himself and his dependents, and his situation is no different than had he been ordered to duty at an Army post and assigned quarters by the commanding officer of the post. Having been reimbursed the amount he was required to pay for rental of quarters during the period he was detailed to duty in the Panama Canal, plaintiff is not entitled, under the act of April 9, 1935, to recover an additional amount as rental allowances for that period, and the petition will have to be, and is hereby, dismissed.

It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

JAMES V. MARTIN v. THE UNITED STATES

[No. E-446. Decided January 9, 1939]

On the Proofs

Patents; expert testimony.—Where no witness testified to that effect, and there is no direct testimony that the method in question involved only mechanical skill, but the evidence as a whole makes this conclusion manifest, direct testimony by an expert is not required in order to enable the court to reach a conclusion.

Same; landing wheel for aeroplanes.—Upon the evidence it is found that in a landing wheel for an aeroplane, it was on March 12, 1918, the date of plaintiff's application which matured into patent #1432771, issued to plaintiff on October 24, 1922, not new to have:

An outer rim and tire rotatable upon an inner part not rotatable;

A nonrotatable axle mounted in a guide slot so as to provide for a substantially vertical relative movement between the two nonrotatable parts;

The vertical movement resisted by elastic bands wrapped around portions of the two nonrotatable parts in such a manner as to permit a yielding under heavy loads or shocks;

Rubber for the elastic material in the bands;

The shock-absorbing element placed within the side planes of the wheel, and while a shock absorber using elastic bands had not been so located, such an operation would naturally be suggested to those skilled in the art who wished to minimize the wind resistance of the wheel.

Same; shock absorbers.—Prior to the issuance of plaintiff's patent, in suit, there were two kinds of shock absorbers well known; one used springs located within the plane of the wheel, and the other rubber bands on the same general plan as that described in plaintiff's patent but located outside of the plane of the wheel; scientific journalists discussed the location of the shock absorbers within the planes of the wheel without reference to the type used, and this could be done with either type by those skilled in the art.

Same; claims held invalid.—Claims 1 and 2 of the patent of plaintiff are held to be invalid because of complete anticipation, and claims 3 and 4 for want of patentable novelty or invention over the prior practical, patented, and published art.

The Reporter's statement of the case:

Mr. Norman H. Samuelson for plaintiff. *Mr. Theodore A. Hostetler* was on the briefs.

Mr. Paul P. Stoutenburgh, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for defendant. *Messrs. Samuel E. Darby, Jr.*, and *Frank H. Harmon* were on the brief.

The court made special findings of fact as follows:

1. An aeroplane in order to take off from, or land upon, the ground is provided with a landing gear or mechanism comprising certain framework mounted on the lower part of the fuselage, which framework is provided with a pair of wheels. Such landing gear structure includes, as an essential element, mechanism for absorbing the shocks produced by the wheels contacting the ground in landing and the irregularities of the ground surface as the aeroplane traverses the same during the take-off, and the landing run.

2. On March 12, 1918, James V. Martin, the plaintiff in this case, filed in the United States Patent Office an application for letters patent entitled "Ground Wheels for Aeroplanes," the title of which was subsequently changed to

"Wheel" by an amendment. This application matured into the patent in suit, United States Letters Patent #1432771, which was issued to the plaintiff on October 24, 1922. There is no satisfactory evidence of any date of invention prior to March 12, 1918, the filing date of the above referred to application. A copy of the file wrapper and the contents, defendant's exhibit 6, is by reference made a part of this finding.

3. The plaintiff, James V. Martin, is a citizen of the United States and was enrolled in the United States Naval Auxiliary Reserve on March 21, 1918, to February 7, 1920, during which period plaintiff was never ordered to active duty. From March 21, 1918, to January 2, 1920, plaintiff received retainer pay from the United States at the rate of $12.00 per annum. From February 1, 1919, until May 15, 1919, plaintiff served as a civilian employee in the service of the United States Government at McCook Field, Dayton, Ohio.

On May 7, 1919, plaintiff was ordered by the Division of Operations, United States Shipping Board Emergency Fleet Corporation, to take up his duties as Master of the S. S. *Lake Fray*, a vessel registered as follows: "The United States, represented by the United States Shipping Board, is the only owner of the vessel called the *Lake Fray*."

Plaintiff was paid as Master of the *Lake Fray* from May 8, 1919, to July 7, 1919, and from July 28, 1919, to January 7, 1920. The disbursements were made by the United Transportation Company, 17 Battery Place, New York, N. Y., which managed and operated the vessel under agreements between that company and the United States Shipping Board Emergency Fleet Corporation, such disbursements being charged to the account of the United States Shipping Board Emergency Fleet Corporation.

4. Plaintiff was not in the employment or service of the United States Government at the time he invented the device covered by the patent in suit and filed the application for letters patent thereon, nor was he in such employment or service when the petition in this case was filed July 28, 1925.

5. The patent in suit summarizes the problems involved in a wheel construction adapted for aeroplanes and the object of the invention in the following phraseology:

> The ground wheels of an aeroplane are subjected to very severe lateral strains and to heavy shocks due to its coming into contact with the ground at high speeds, and much difficulty has been experienced in providing wheels sufficiently light for the purpose and yet having sufficient rigidity to withstand those strains, and also having the necessary resiliency to relieve both wheels and chassis from the severe shocks incident to landing.
>
> An object of this invention is to provide wheels for this purpose which, while they are light in weight and durable, have great strength to resist crushing and lateral strains and offer the maximum of resiliency to absorb shocks and to yieldingly support the chassis. A further object of the invention is to provide a construction wherein the wheels, upon coming into contact with the ground, may have an extended upward movement relative to the fixed chassis axle, thereby bringing the lateral thrust of the axle upon each wheel near the point at which it is in contact with the ground, and to provide certain other new and useful features in the construction and arrangement of parts, all as hereinafter more fully described and particularly pointed out in the appended claims, reference being had to the accompanying drawings.

The construction disclosed in the specific embodiment and as shown in the patent drawings, Figure 1 of which is reproduced herewith, comprises the following construction:

The wheel is comprised of a rotatable part provided with a suitable tire on its periphery, this rotatable part being carried by a non-rotatable part which is provided with a vertical guide slot. The axle structure of the wheel, which is specified in the claims as a second non-rotatable part, is mounted in the guide slot in such a manner that vertical relative movement may take place between the two non-rotatable parts.

Such vertical movement is resisted by wrapping a plurality of bands of elastic material around certain rounded parts carried by the axle structure and the non-rotatable portion of the wheel. These elastic bands thus suspend the entire weight of the axle and landing chassis from the upper portion of the non-rotatable wheel element.

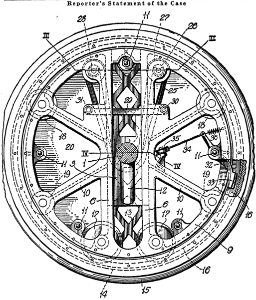


Fig. 1 of Patent in Suit and Fig. 1 of Findings.

The elastic bands are so proportioned that they will normally hold the axle in the upper part of the vertical slot against a stop, but will yield under heavy loads or shocks permitting the axle to move downwardly in its guiding slot relative to the wheel.

In the specific embodiment disclosed, the shock absorbing structure is located between the planes of the side faces of the wheel, a feature which decreases the wind resistance in this type of structure over one in which the shock absorbing elements are located outside of the wheel plane.

6. The claims in suit are as follows:

1. A wheel comprising a rotatable part and two non-rotatable parts, said non-rotatable parts guided upon each other for vertical movement and wrapped by elastic material to resist the said movement, one of the said non-rotatable parts being secured to the axle.
2. In combination with a vehicle wheel, two non-rotatable, shock absorber parts and elastic bands resisting the separation of the said parts.
3. A resilient support for a wheel comprising two non-rotatable portions, substantially within the tire faces of the said wheel, directionally opposed parts of each of the said non-rotatable portions provided with flanges and rounded parts between the said flanges, and elastic bands wrapped around the said rounded parts and adapted to resist separation of the said parts.
4. A wheel comprising a non-rotatable body provided with a vertical guide way, a rotatable wheel part encircling said body, a non-rotatable wheel carrying member slidable in said guide way, and a plurality of detachable elastic loops to suspend said member from said body, said body and member being provided with smooth curved portions to engage within the loop ends of said elastic loops, said elastic loops being located between the planes of the side faces of the wheel.

Claims 1 and 2 do not contain the limiting phraseology directed to the location of the shock absorber elements within the tire faces or planes of the side faces of the wheel.

7. The types of aeroplane wheel structure used by the United States Government and alleged to infringe the patent in suit, are typified by the drawings forming defendant's exhibit 21 which is by reference made a part of this finding.

These types are identified therein as follows:

Verville-Sperry
Loening Amphibian
Curtiss R2C-1
Dayton-Wright Alert
Dayton-Wright Shipboard (WA)

The Government shock absorber and wheel construction, as disclosed in above-mentioned types, comprises a wheel consisting of a rotatable portion or element and provided with a tire on its periphery, this rotatable part being carried by a non-rotatable part. The axle portion of the

structure which may be specified as a second non-rotatable part is mounted in a guide slot or is otherwise provided with suitable guiding means to provide for a substantially vertical relative movement between the two non-rotatable parts.

This vertical movement is resisted by elastic bands wrapped around rounded portions of the two non-rotatable parts, these elastic elements functioning to permit a yielding under heavy loads or shocks.

In all of the types above referred to, the shock absorbing structure is located between the planes of the side faces of the wheels. Drawings with explanatory legends illustrating the Curtiss R2C-1 type are reproduced herewith.

Apart from minor structural details the other alleged infringing types listed above are of this same general nature.

8. The terminology of the claims in suit reads upon all of the structures referred to in the previous finding.

9. During the trial of this case, plaintiff disclaimed infringement by the following structures shown in plaintiff's exhibit 17a which is by reference made a part of this finding.

Dayton-Wright Alert Plane, Type 1 (plaintiff's exhibit 17a, p. 7).

Curtiss Cr 1 and 2 Racers (plaintiff's exhibit 17a, p. 6).

Curtiss PW8 Plane (plaintiff's exhibit 17a, pp. 10, 11).

Altitude Record Plane XC05A (plaintiff's exhibit 17a, pp. 12, 13).

10. The prior art cited by the Patent Office during the prosecution of the application which materialized into the patent in suit was as follows:

British patent #8020, issued in 1895 to Lawson Adams.

British patent #25169, issued in 1899 to W. P. Thompson.

United States patent #322188, issued July 14, 1885, to C. W. Long.

United States patent #1167307, issued January 4, 1916, to F. J. McCandless.

United States patent #1193639, issued August 8, 1916, to G. W. Walk.

Copies of these patents, defendant's exhibits 7b, 7c, 7d, 7e, and 7f, are by reference made a part of this finding.

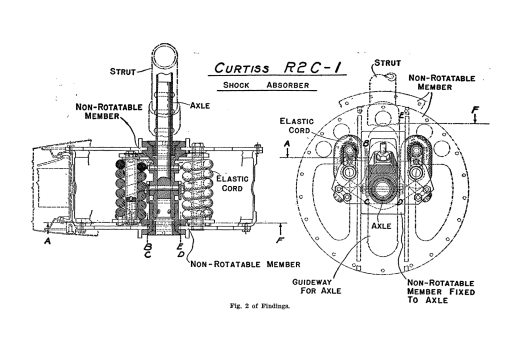


Fig. 2 of Findings.

11. The following additional prior art patents and publications were available to those skilled in the art prior to the filing of the application which materialized into the patent in suit:

Prior Art Patents

United States patent #1162177, issued November 30, 1915, to G. C. Loening (defendant's exhibits 8C and 9C).

United States patent #812143, issued February 6, 1906, to W. M. Leffort (defendant's exhibits 8R and 9R).

United States patent #1041097, issued October 15, 1912, to C. L. Kennedy (defendant's exhibits 8S and 9S).

United States patent #1094259, issued April 21, 1914 to S. Scognamillo (defendant's exhibits 8T and 9T).

United States patent #1163509, issued December 7, 1915, to N. Cornfield (defendant's exhibits 8U and 9U).

United States patent #1049280, issued December 31, 1912, to G. Sturgess (defendant's exhibits 8–O and 9–O).

United States patent #1179974, issued April 18, 1916, to J. E. Strietelmeier (defendant's exhibits 8G and 9G).

United States patent #1316279, issued September 16, 1919, to G. H. Curtiss (defendant's exhibit 19N).

British patent #21360, 1911, issued to F. W. Lanchester (defendant's exhibits 8E and 9E).

British patent #6461, 1912, issued to N. A. Thompson (defendant's exhibits 8F and 9F).

Publications

Flight, of October 19, 1912, pages 942, 943 (defendant's exhibits 8D and 9D).

Aeronautical Journal, April 1911, pages 90, 92 (defendant's exhibits 8P and 9P).

Aviation, of September 1, 1916, pages 78–82, inclusive (defendant's exhibits 8Q and 9Q).

Aerial Age Weekly, of June 5, 1916, page 365 (defendant's exhibits 8H and 9H).

Aerial Age Weekly, of August 21, 1916, page 691 (defendant's exhibit 19B).

The Aeroplane, of September 6, 1916, pages 398, 402, 408 (defendant's exhibit 19C).

Flight, of September 7, 1916, page 764 (defendant's exhibit 19D).

Jane's All The World's Aircraft, 1917, pages 228B and 229B (defendant's exhibit 19E).

Aerial Age Weekly, of June 4, 1917, page 379 (defendant's exhibits 8–I, 9–I, and 19A).

Aerial Age Weekly, of June 18, 1917 (defendant's exhibits 8J and 9J).

Aviation, of August 1, 1917, pages 39 and 40 (defendant's exhibits 8K and 9K).

Aerial Age Weekly, of August 20, 1917, page 833 (defendant's exhibits 8L and 9L).

Copies of the above, defendant's exhibits as indicated, are by reference made a part of this finding.

12. In connection with a consideration of the prior art, attention is directed to the fact that the specification of the patent in suit defines the elastic bands or elastic material, referred to in finding 5 and in the claims in suit set forth in finding 6, as follows:

> To yieldingly support the axle within its guides 6 in the wheel web, a plurality of endless elastic bands 25 or members of other suitable resilient material and construction are supported and carried upon the wheel web or body by passing suitable rolls 26 through the looped ends 27 of the bands * * *.

Webster's New International Dictionary (1912) defines the terms "elastic" and "resilient" as follows:

> *Elastic*—expansive; propulsive; springing back; springy; of solids, capable of recovering size and shape after deformation.
>
> *Resilient*—leaping back; rebounding; recoiling; returning to, or resuming, the original position or shape; possessing resilience; specif.: (*Mech.*) of a body, capable of withstanding sudden shock without permanent deformation or rupture.

There is no limitation expressed in the patent in suit as to the use of rubber as the elastic or resilient material.

13. Prior art wheels of the same general type as the wheel in the patent in suit are shown in the following patents:

United States patent to Walk, #1193639, August 8, 1916 (defendant's exhibit 7F).

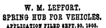
United States patent to Cornfield, #1163509, December 7, 1915 (defendant's exhibit 8U).

United States patent to Scognamillo, #1094259, April 21, 1914 (defendant's exhibit 8T).

United States patent to Leffort, #812143, February 6, 1906 (defendant's exhibit 8R).

These patents disclose a wheel structure comprising a rotatable part and two non-rotatable parts guided upon each other for relative vertical movement by means of a vertical guide slot (or its structural equivalent) and resilient or elastic means comprising metal springs for resisting said movement, with all of the elements substantially located between the planes of the side faces of the wheel.

Figures 1 and 2 of the Leffort patent are herewith reproduced as illustrative of this prior art structure:



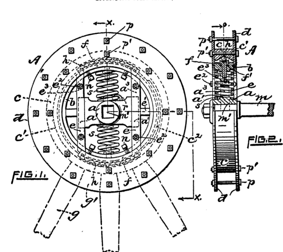


Fig. 3 of Findings.

Reporter's Statement of the Case

The structure specified by the claims of the patent in suit differs from the disclosure contained in these patents only in the designated use of "wrapped elastic material" or "elastic bands" wrapped around rounded parts as the shock absorbing element instead of the spiral elastic springs.

14. The prior use of wrapped elastic material or an elastic band as the shock absorbing element in connection with aeroplane landing gear structure, is disclosed in the following prior art patent and publication:

United States patent to Loening, #1162177, November 30, 1915 (defendant's exhibit 8C).

Page 942 of the publication entitled "Flight," in the issue of October 19, 1912 (defendant's exhibit 8D).

This patent and publication both illustrate and describe a shock absorber construction for aeroplane landing gear with the shock absorbing element located between the axle and the landing gear chassis adjacent the wheel. The shock absorbing device in each instance comprises two non-rotatable portions, i. e., the axle and the chassis frame. The directionally opposed parts of each of these non-rotatable portions are provided with rounded parts and have elastic bands wrapped around the rounded parts in such manner as to resist separation of these two portions.

The patent to Loening discloses the two non-rotatable parts guided upon each other for a movement which is substantially vertical.

15. Such type of prior art construction as set forth in finding 14 is found exemplified by the shock absorber used on aeroplanes designated as the Curtiss CR1 and CR2. This construction which is shown diagrammatically on a following page also involves the use of an elastic cord wrapped about two non-rotatable members guided upon each other for substantially vertical movement and composed respectively of the axle shaft and the chassis members adjacent the wheel.

16. The relative advantages and disadvantages of elastic cords of rubber as compared to metallic springs for shock absorbers on aeroplanes were well known prior to the filing of the application which matured into the patent in suit, and

are fully set forth in an article by J. C. Hunsaker contained on pages 78 to 82, inclusive, of the publication entitled "Aviation," in the issue of September 1, 1916 (defendant's exhibit 8Q).

The utilization of either rubber cords or metal springs with their associated mountings was within the choice of those skilled in the art.

17. A wheel, known as the Ackerman aeroplane wheel, was in public use on aeroplanes in 1916. This wheel formed the basis of the patent to Strietelmeier issued April 18, 1916 (defendant's exhibit 8G), and as disclosed in said patent and used on said aeroplanes, comprised a rotatable rim carrying a tire, which rim was connected to a rotating hub-member by means of a plurality of loop-like steel spring spokes emerging radially in straight portions at the point of attachment of the hub and converging in pairs to the point of attachment at the rim.

The resilient or shock-absorbing spokes are all located within the planes of the sides of the wheel and the efficacy of such structure in minimizing wind resistance was known to those skilled in the art prior to the date of the patent in suit, and was specifically referred to in this connection in an article on the Ackerman wheels on page 833 of the publication entitled "Aerial Age Weekly" in the issue of August 20, 1917 (defendant's exhibit 8L), in which article it was stated:

> A further advantage is the presentation of minimum projected area and consequential dead head-resistance. The desirability of low head-resistance in the chassis, as well as unfailing resistance to breakage, makes these wheels especially adaptable to scouts of high landing-speeds. The wheels are, however, made in sizes suitable for all types of aeroplanes from the light scout to the heavy battleplane.

18. To substitute an elastic material or elastic bands wrapped around rounded parts for the elastic or resilient metal springs in the prior art wheels of the type referred to in finding 13, or to relocate the rubber shock absorber of the Curtiss type CR1 and CR2 (finding 15) within the plane of the wheel, would require only mechanical skill and would not contribute any new or unexpected result to the art.

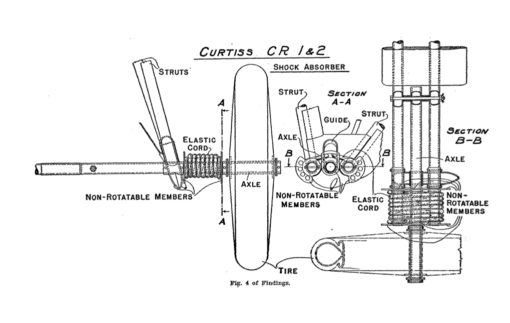


Fig. 4 of Findings.

The claims in suit are invalid for lack of invention in view of the prior art.

19. On March 28, 1919, the plaintiff, James V. Martin, sent a letter to the Secretary of War, which letter reads as follows:

To the SECRETARY OF WAR,
Washington, D. C.

DEAR SIR: Kindly place this letter on file as a record of my bonafide offer acceptable now or at any time in the future to give or sell for one dollar ($1.00) each to the United States War Department for Army use, the following airplane efficiency features which as your records will show, have been freely at your disposal during the war.

The Retractable Chassis.
Shaft drive aeroplane power transmission.
The K-bar cellule Truss.
The Rubber Strand Shockabsorbing Wheel.
The Shockabsorbing Rudder.
The Martin form of Wing end.
The Wing end double convex aileron.
The Aerodynamic Control.
The M. I, II, III, & IV Aerofoils.
The Wing end direction moment device.
The diaphragm from wing to aileron or fuselage to Rudder.
The Perfect Type Plane #1.

Please also note and file the attached correspondence which will serve as a record of my vain efforts to secure Army approval for these features of inevitable future airplane design.

I am informed from sources which may or may not be reliable that the real reason my efforts to introduce the above features are thwarted, is because of the influence of certain powerful financial interests that tried to buy my patent rights in the devices with the intention of selling the same to our Government at a handsome profit.

Since the interests in question have failed to induce me to depart from my patriotic policy of giving these devices to our Government for Government use, it is affirmed that they, the interests, have so influenced officials in charge of airplane design work as to discourage my efforts and force me to seek other fields of endeavor until such time as the interests identified with an air-

plane manufacturing combination should build and sell to our Government planes embodying the features enumerated above and which I have developed and patented during the course of the last ten years.

Very truly yours,

(Signed) JAS. V. MARTIN.

20. Under date of August 26, 1920, Captain R. H. Fleet, the contracting officer of the Engineering Division, Air Corps, War Department, wrote to the plaintiff Martin as follows:

From: Contracting Officer, Engineering Division.
To: Mr. James V. Martin, Room 613, 280 Madison Ave., New York City.
Subject: Contract No. 263.

1. Receipt is acknowledged of your letter of August 24, advising of the delays in securing tires and other materials for Contract No. 263.

2. We wish to thank you for your offer of a license under your patents for retractable landing gears and improvements thereon. Your offer is hereby accepted and this office will forward a license to you in the course of a few days for execution, wherein the rights referred to in your letter are conveyed to the Government for the sum of One Dollar ($1.00).

(Signed) R. H. FLEET,
Captain, A. S.

21. On September 8, 1920, a license was forwarded to the plaintiff, together with a letter signed by Captain Fleet, the contracting officer, which letter reads as follows:

From: The Contracting Officer.
To: Mr. Jas. V. Martin, Room 612, 280 Madison Avenue, New York City.
Subject: License for Retractible Chassis.

1. Receipt is acknowledged of your letter of September 2, with enclosures. The license has been re-drawn so as to provide that the rights conveyed to the Government are for military and naval purposes only. This office will notify the Navy Department that such rights have been secured for it. The payment of $1.00 will be made by this Division.

2. Three (3) copies of the license are herewith inclosed for execution by yourself. You may retain one copy and return to this office two of the copies after you have signed the same and had same acknowledged before

a Notary Public. The acknowledgment is not really required, but this office deems it desirable to have it acknowledged for the purpose of recording in the Patent Office.

3. A formal acceptance on the face of the license is not necessary in order to make the same valid as the payment of one dollar ($1.00) will form the consideration for the granting of the license. This office will be glad to write you a letter, however, after you have executed the license, stating that the same has been accepted.

3 incls. (Signed) R. H. FLEET,
Captain, A. S.

22. The plaintiff on September 20, 1920, signed, sealed, and acknowledged and delivered to the contracting officer of the Engineering Division, Air Service, War Department, a license agreement relating to the patent in suit which reads as follows:

LICENSE

Whereas, I, James V. Martin, of Dayton, Ohio, have invented certain retractible landing gears for airplanes for which Letters Patent of the United States, No. 1306768, have heretofore been issued to me; and

Whereas I have invented certain shock absorbing wheels for airplanes and certain improvements in retractible landing gears for airplanes, and have heretofore made application to the United States Patent Office for patents covering said inventions; and

Whereas, I desire to sell to the United States of America a non-exclusive right and license to make, have made, use and sell all of said inventions, for military and naval purposes, and the United States of America desires to secure such rights;

Now, Therefore, in consideration of the premises and of the sum of One Dollar ($1.00) paid by the United States of America to me, the receipt of which is hereby acknowledged, I do hereby grant to the United States of America, the irrevocable but non-exclusive right and license to make, have made, use and sell, for military and naval purposes only, the said invention described in the specification on said Patent No. 1306768, and to make, have made, use and sell, for military and naval purposes only, any and all other inventions and improvements of shock-absorbing airplane wheels and retractible landing gears for airplanes as may have been heretofore, or may be hereafter, made, perfected, or de-

vised by me. Said right and license, or licenses, shall extend throughout the United States and its territories, and shall remain in force and effect for the full period of said patents or other rights.

In Witness Whereof, I have executed the foregoing instrument this 20 day of September 1920.

Witnesses:

(Signed) DANIEL F. NUYRUT,
(Signed) HORACE KEANE.
(Signed) JAMES V. MARTIN. [SEAL]
Washington, D. C.

Accepted for the War Department.
By ———,
Washington, D. C.

Accepted for the Navy Department.
By ———

STATE OF NEW YORK,
County of New York, ss:

On this 20 day of September 1920, before me, a Notary Public in and for the State and County of New York, duly came and appeared James V. Martin, to me known and known to me to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed said instrument for the uses and purposes therein expressed.

In Witness Whereof, I have hereunto affixed my hand and official seal at the City, County, and State of New York, the day and year above written.

(Signed) DANIEL F. NUYRUT,
Notary Public, New York County,
State of New York.

My commission expires March 30, 1921.

23. Under date of September 24, 1920, the contracting officer acknowledged the receipt of the license by the following letter in which was enclosed a voucher for $1.00, and the copy of the letter from the contracting officer to the Adjutant General of the Army, Washington, D. C. These letters are as follows:

From: The Contracting Officer.
To: Mr. James V. Martin, Room 612, 280 Madison Avenue, New York City.
Subject: License to the Government.

1. This Division acknowledges two originals of the non-exclusive license which you are giving to the Gov-

ernment for military and naval purposes in connection with your retractable landing gear and shock-absorbing airplane wheel.

2. Inclosed is a voucher in the sum of $1.00 for you to sign and return to this office, so that it may make the proper disbursement.

3. Also inclosed is a copy of a letter this day written to the Adjutant General of the Army, which is self-explanatory.

4. This Division desires to thank you for your unsolicited action in this matter.

(Signed) R. H. FLEET,
Captain, A. S.

From: The Contracting Officer.
To: The Adjutant General of the Army, Washington, D. C. (Thru Channels.)
Subject: License under Patent 1306768 (Shock-absorbing Airplane Wheels and Retractable Airplane Landing Gears).

1. Herewith find two originals of a license received from James V. Martin under his patent 1306768 covering the irrevocable but non-exclusive right and license from him to make, have made, use and sell, for military and naval purposes only, certain shock-absorbing wheels and retractable landing gears for airplanes.

2. It is requested that the Secretary of War indorse the acceptance of the War Department on both originals and transmit them to the Secretary of the Navy for the same purpose, returning the two originals thereupon to this office, whereupon one original will be sent to Mr. Martin with a check for $1.00, the consideration, and the other copy will be kept in the records of the Air Service at this Division.

3. Since this Division considers that both of these inventions are of a military and naval value to the country, it is recommended that the Secretary of War and the Secretary of the Navy, each write to Mr. Martin, thanking him for his tenure of this license to the Government for military and naval purposes at the nominal sum of $1.00.

R. H. FLEET,
Captain, A. S.

On September 24, 1920, the plaintiff sent the following letter to Colonel T. H. Bane:

Col. T. H. BANE, *Chief*,
Engineering Division, Air Service,
McCook Field, Dayton, Ohio.

DEAR SIR: No doubt Major Fleet has told you that I have signed the sale and assignment of my Retractable Chassis and Shock Absorbing Wheel patents to the Army and Navy for one dollar.

I feel sure you will accept this act as proof of my desire to work in entire accord with your organization for the efficient development of airplanes. The patents mentioned above have cost no less than three thousand dollars in prosecution and the engineering work I have done on retractable chassis will come to quite twelve thousand dollars; I mention this in order that you may not think lightly of my deliberate gift of these patents to the Army and Navy.

In addition to the assignment of the patents I wish to place my personal services at your disposal with much engineering data relating to successful types of retractable chassis and to beg you to use these as you may see fit.

I shall be glad to design retractable chassis for you or for any prospective bidder and can furnish you, without cost, a tentative layout using any desired relation of wheels to fuselage or wings and provided with standard or wheel type shock absorbers.

I am spending nearly all my time (and heaps of money!) developing and refining the shock absorbing wheels to meet your special needs and shall come to McCook Field for conference bringing such layouts as you desire.

Hoping that I shall be able to convince you of my ability and sincerity, I remain,

Yours truly, (Signed) JAS. V. MARTIN.

P. S.—When in Washington last week I met Gen'l Mitchell who said that he favored the use of retractable chassis, whereupon I asked him to write you a letter to that effect.

24. On February 18, 1921, the license agreement was returned to Martin, with the spaces for the signatures of acceptance by the War Department and the Navy Department unindorsed and unsigned, together with the voucher

for $1.00 which Martin had previously signed and forwarded for payment by letter, which letter reads as follows:

> From: Acting Business Manager.
>
> To: Mr. James V. Martin, 26 W. 65th St., New York City.
>
> Subject: License James V. Martin Patent No. 1306768.
>
> 1. The Patent Section of the Air Service has made an investigation of your patent No. 1306768 covering aircraft running and alighting devices. It is the opinion of the Patent Section that it would be inadvisable for the United States to accept a license under this patent, even for a nominal consideration, for the reason that the legal effect of such an acceptance might be to give this patent certain artificial values which our patent experts do not think it is entitled to have.
>
> 2. For your information there is a well-recognized principle of patent law that a licensee under a patent is estopped from questioning the validity of the patent under which the license is granted. The Patent Section believes that your patent is of very limited scope and of doubtful validity, and for that reason it is not believed advisable to accept a license under your patent on account of the estoppels which would result by reason of such action. Your licenses are therefore herewith returned, together with a voucher for one dollar presented by you some time last Fall.
>
> (Signed) F. D. SCHNACKE,
> *Acting Business Manager.*

25. The plaintiff on March 12, 1921, sent a letter relating to the return of the license to the Chief of Engineering Division, Air Service, War Department, which letter was as follows:

> MARTIN AEROPLANE FACTORY,
> ELYRIA, OHIO, ROOM 1003 AT 299 MADISON AVE.,
> *New York, N. Y., Mar. 12, 1921.*
>
> Col. T. H. BANE,
> *Chief Eng., Div., Air Service,*
> *McCook Field, Dayton, Ohio.*
>
> DEAR SIR: I am in receipt of a letter under date of Feb. 18th, last from your acting business Manager, F. D. Schnacke transmitting therewith two copies of the license which I executed in favor of the United States Government on the twentieth day of September 1920,

for all my retractable chassis and shock-absorbing wheel patents for military and naval purposes only. There was also inclosed returned voucher for one dollar covering payment for patent 1306768 and other patents.

I wish to understand clearly the status of the present relation of my chassis and wheel patents to the Government so far as you are concerned, i. e., was the return of the license and voucher done with your consent and approval and as a result of such return by your order am I to understand that the Government has no title or right in my patents above referred to and as conveyed by me in the license returned to me?

You will naturally understand my desire to be certain of the status of so important a matter as the transfer of the patent rights above referred to which I value at ten million dollars.

Yours truly,

(Signed) JAS. V. MARTIN.

26. This letter was answered under date of March 25, 1921, from the contracting officer of the Engineering Division, Air Service, War Department, as follows:

From: The Contracting Officer.
To: Mr. James V. Martin, Room 1003, 299 Madison Ave., New York City.
Subject: License under Patent No. 1306768.

1. Your letter of the 12th instant, addressed to Colonel Bane, has been referred to this office for reply. In the matter involved in the acceptance or non-acceptance of your license, this office was guided by the advice of the Patent Section of the Air Service. The papers referred to in your letter of the 12th instant were not returned with the personal knowledge of the Chief of this Division, but you may rest assured that such return was properly authorized.

2. You are correct in your understanding that the Air Service has declined to accept a license under your patent No. 1306768 and applications pending. The grounds for this action are as follows:

(a) An investigation has determined that your patent No. 1306768 is of doubtful validity;

(b) An acceptance of a license under that patent would estop the United States from contesting its validity and tend to give it an artificial value to which, in the opinion of our patent experts, it is not entitled;

(c) Since the license you propose to give the United States runs only for army and navy purposes, other

branches of the Government are excluded therefrom, and if the Government should accept your license and thus should permit itself to be legally estopped from contesting the validity of the patent, the Government's rights would be prejudiced, should it ever be alleged that branches of the Government other than the army and navy infringe thereon;

(d) While the Government has never infringed your patent, still it would be inadvisable for the Government to put itself in the position of being estopped from contesting the validity of the patent, should any infringement ever be alleged to have occurred prior to the date of the license.

(Signed) R. H. FLEET,
Captain, A. S.

On May 5, 1921, the plaintiff sent a letter to the Bureau of Information, War Department, reading as follows:

ROOM 1003 AT 299 MADISON AVE., N. Y.,
May 5th, 1921.

BUREAU OF INFORMATION WAR DEPARTMENT,
Washington, D. C.

Subject: Patent rights for Ordnance and the like.

As the writer has valuable patents which he desires to introduce to the War Department he seeks the following information:

Is it the practice of the War Department to permit some of its contracting officers on behalf of the Secretary of War to issue contracts which obligate the government to save the contractor harmless from loss due to infringement of patents which the contractor does not own?

Have certain Divisions of the War Department authority to call publicly for design bids on apparatus to be manufactured by the bidder and to insist as a condition of awarding such contract that each contractor assign to the government any and all patents involved in the design for nonexclusive use by the government in any manner desired?

If the War Department sanctions such contracts is this not reversing the patent clause of the United States constitution by arbitrarily insisting that a patent is of no value, since those contractors having neither patents nor claim to patents are paid an equivalent amount for their designs?

Can a patent license once accepted, for and in consideration of the sum of one dollar receipt of which is

acknowledged in the license, be returned and nullified by any officer of the War Department when the original purchase and acceptance was executed by an authorized agent of the Secretary of War?

Yours truly,

(Signed) J. V. MARTIN.

To plaintiff's letter of May 5, 1921, the Chief of the Patents Branch of the Ordnance Department, by letter dated May 13, 1921, replied as follows:

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ORDNANCE,
Washington, May 13, 1921.

Mr. JAMES V. MARTIN,
Room 1003, 299 Madison Avenue,
New York City, N. Y.

SIR:

Subject: Patent Rights for Ordnance and the Like

1. Receipt of your communication of May 5, 1921, seeking certain information preparatory to submitting patents to the War Department is acknowledged.
2. The War Department will be pleased to consider your inventions whenever it may be convenient for you to submit the same for their consideration.
3. In reply to the question contained in paragraph two of your letter and relating to the practice of the War Department in agreeing to save contractors harmless from loss due to infringement, etc., the War Department does enter into such an agreement when the circumstances of the case warrant the same.
4. In answer to the question contained in the third paragraph of your letter, there might be times when the circumstances surrounding the awarding of special development contracts were such that the government would require the contractor to grant it a non-exclusive license under any and all inventions used or resulting from such development work.
5. The questions contained in the last two paragraphs of your letter call for a legal opinion which it is not the province of the War Department to render.

By direction of the Chief of Ordnance.

Respectfully.

R. H. HAWKINS,
Major, Ordnance Department, U. S. A.
By W. N. ROACH,
Chief, Patent Branch.

27. On or about September 15, 1920, the Engineering Division, United States Air Service, McCook Field, Dayton, Ohio, forwarded to aeroplane designers in the United States, including the plaintiff, a circular letter inviting submission of original designs of aeroplanes having certain, more or less, general specifications. This letter a copy of which, defendant's exhibit 13B, is by reference made a part of this finding, contained the following phraseology:

> The said payments for any design shall, without further consideration, convey to the Government, the non-exclusive ownership of that design, together with the right to the Government to use the same and all the information and data furnished, in any manner deemed advisable by the Government.

In response thereto plaintiff submitted to the Engineering Division the design of a single-seater pursuit aeroplane comprising drawings and specifications. A copy of this design, defendant's exhibit 13A, is by reference made a part of this finding.

The design submitted incorporated as one of its features a wheel having the following description:

> This machine is equipped with a Martin 26 x 4 wheel with the shock absorber mechanism incorporated within the wheel.

Other than this statement no further details of the wheel construction were set forth.

28. On November 27, 1920, plaintiff wrote the following letter to the War Department:

> From: J. V. Martin, Contractor.
> To: Major R. H. Fleet, Contracting Officer, U. S. Air Service.
> Subject: Government Purchase of Patent Rights.
>
> 1. Receipt is acknowledged of Division letter dated Nov. 24th last and inclosing five copies of contract #334. Relative to articles one, two, and three of said contract the following information is respectfully requested.
>
> 2. What is the scope of the phrase "for governmental purposes?" Regardless of the value, real or imaginary, of the patents represented in the design referred

to in the above contract does the government insist upon its right to buy these patents for the sum of $2,500?

3. It has for years been the consistent stand of the writer that his patents should be freely at the disposal of the government for use of the Army and Navy, since these organizations are used for the defense of our country and the Contracting Officer is aware of this attitude, however the $2,500, which the Government proposes to pay for the said design does not equal the actual cost of draughtmen's and computer's labor in preparing the designs submitted by the writer. Nevertheless the writer is perfectly willing to sign the above contract assigning to the Government his valuable patent rights providing he is assured that the right so conveyed will not be used in commercial competition with the writer in transporting Mail, express, or passengers; in short the writer believes every just and proper right will be secured to the Government by restricting the sale of patent and design rights to use for Army and Navy Purposes. It is respectfully pointed out that the contract as drawn would give the Government the right to use the said patents and designs in any commercial field either through the Post Office decision to carry express and passengers or through a Civil Air Service should such be created.

4. In view of the fact that the patents involved in the above design have cost over $30,000.00 in fees and prosecutions alone and have already been assigned by the writer to corporations in foreign countries, with what propriety could the writer sell and transfer the said patents and patent and design rights in foreign countries to the U. S. Government? Would such sale be effective in view of the former sales and would not the writer be guilty of a penal offense in reselling patents already disposed of?

5. In cases where the writer has already assigned some of his U. S. Patents, with what propriety could he sign the contract #334?

Yours truly,

/s/ JAS. V. MARTIN.

29. On December 11, 1920, a formal written contract No. 334 was entered into and executed between the plaintiff and the United States, by which the design submitted by plaintiff referred to in the previous finding was sold to the Government. This contract contained the following clauses:

Article I

The Contractor hereby sells, transfers, and conveys to the Government his original design of Single Seater Pursuit Airplane with air-cooled engine and all the engineering data, drawings, and information therefor as delivered to the Engineering Division, Air Service, on or about November 15, 1920, and now in the possession of said Division, together with the unrestricted right to use the said design, or any portion or feature thereof, and all said engineering data, drawings, and information in any manner deemed advisable by the Government for the development, modification, or perfection of the type specified herein. Copies of said circular proposal and specification are attached hereto and made a part hereof.

Article II

The Government shall forthwith pay the Contractor the sum of Twenty-five Hundred ($2,500.00) Dollars for said design and all of said data, drawings, and information mentioned in Article I hereof.

Article III

The Contractor agrees to grant, and by the execution of this contract does grant, to the Government, without further consideration, the irrevocable but nonexclusive right and license to make, have made, use and sell, for governmental purposes, any and all airplanes and/or parts thereof, of the type designed by the Contractor hereunder, and to practice or cause to be practiced any and all discoveries, inventions, improvements, and/or suggestions that have been or may be made, perfected, or devised by the Contractor, his representatives, employes, or other cooperators in connection with or incident to, or in any manner used in, the design furnished by the Contractor hereunder, under any and all patents and/or other rights based upon such discoveries, inventions, improvements, and suggestions. Said right and license shall extend throughout the United States and its territories, and shall remain in full force and effect for the full period of the term or terms of said patents or other rights.

A copy of this contract, defendant's exhibit 13B, is by reference made a part of this finding.

The plaintiff was duly paid $2,500.00 by the United States in accordance with the provisions of this contract.

30. Under date of April 3, 1922, a second written contract was entered into and executed between the plaintiff herein and the United States through R. H. Fleet, its contracting officer attached to the Air Service, which contract is Army Contract No. 538. This contract contained among others the following clause:

Article VI

The Contractor agrees to grant, and by the execution of this Contract does grant, to the Government, without further consideration, the irrevocable but non-exclusive right and license to make, have made, use and sell, for Governmental purposes only, any and all arts, machines, manufactures, compositions of matter, and/or designs, and to use and practice, or cause to be practiced, any and all discoveries, inventions, improvements, and/or suggestions that may be made, perfected, or devised by the Contractor, his representatives, and/or employees in connection with or in pursuance of the performance of this contract, under any and all patents and other rights based upon such discoveries, inventions, improvements, and/or suggestions. Said right and license hereby granted shall extend throughout the United States, its territories, and all foreign countries in which such patents or other rights shall be obtained, and shall remain in force and effect for the full period of said patents or other rights.

31. The plaintiff did not sign said contract until he had received from the said contracting officer of the Army Air Service a letter dated March 27, 1922, which reads as follows:

F. D. Schnacke—DRR

WAR DEPARTMENT, AIR SERVICE,
ENGINEERING DIVISION,
McCook Field, Dayton, Ohio, March 27, 1922.

From: The Contracting Officer.
To: Mr. James V. Martin, % Martin Aeroplane Factory, Garden City, L. I., N. Y.
Subject: Contract No. 538.

1. This will acknowledge your letter of March 21, returning five copies of Contract No. 538 for certain alterations.

2. Page one has been rewritten so as to change the date of the contract and also to change the provision for tires being furnished with the wheels. The specification has been rewritten to provide that the weight of each chassis, complete with struts, fittings, shock absorbers, wheels, and tires, must not exceed 147 lbs., and also to provide that the tires will be furnished by the Engineering Division free of cost.

3. Page three has been rewritten so as to make the patent license clause refer solely to inventions made in connection with the performance of this specific contract. This license clause, while differing slightly in verbiage from the one contained in your previous contract for shock absorber wheels, has exactly the same meaning and is now our standard license clause. It is therefore not desired to go back to the old form which was in use in your former contract. If you will read Article VI of the inclosed contract carefully, you will see that it refers only to discoveries, inventions, improvements, and suggestions made, perfected, or devised in connection with or in pursuance of Contract No. 538. It would therefore not include inventions made prior to or independently of the performance of that Contract.

4. It is requested that you execute all five copies of the inclosed contract and return the same for execution by the Contracting Officer. You should at the same time forward three executed copies of the surety bond and the certificates of authority which were forwarded to you with our original transmittal letter.

(Signed) R. H. FLEET,
Captain, A. S.

32. The plaintiff delivered the wheels called for by the contract above referred to in finding 31 and received payment therefor. The claims in suit of the Martin patent #1,432,771 are readable upon the design and wheels submitted and delivered by Martin under said Contract No. 538.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff brings this suit to recover compensation for the manufacture by or for the United States on the use by it of certain devices relating to shock absorbing wheels for

aeroplanes which are claimed to infringe Letters Patent to the plaintiff, #1,432,771.

In defense to the action, the defendant sets up that there has been no infringement, that the patent issued to plaintiff is invalid for want of invention, and also makes a special plea in bar that the plaintiff for valuable consideration has granted the United States an irrevocable but non-exclusive right and license to make, have made, use and sell, for Governmental purposes only, any and all of the devices covered by the patent upon which the suit is based.

The case is not as complicated as most patent cases and all essential features of the evidence are set out in detail in the findings of fact. On the first of these defenses the case turns upon the ultimate conclusion to be reached from these facts as to whether the patent was valid or invalid in view of the prior art.

As everyone knows, an aeroplane, in order to take off or land upon the ground, is provided with a mechanism comprising a framework adjacent to the lower part of the fuselage to which framework there is usually attached on the underside thereof a pair of wheels. The speed with which an aeroplane lands makes it necessary, or at least advisable, that these wheels should yield to a greater or less extent to the shock sustained in striking the ground or in the irregularities of the ground surface as it progresses and then resume their former position. The device presented in plaintiff's patent accomplished this purpose by the use of a specially designed wheel.

The wheel described in the Martin patent, as shown by Fig. 1 of the findings and the detailed description contained in Finding 5, does not rotate upon the axle but has, as its periphery, a rotatable part with a suitable tire which is carried by a non-rotatable part provided with a vertical guide slot. The axle structure which is also non-rotatable is mounted in its guide slot which permits a vertical relative movement between the two non-rotatable parts. This vertical movement is resisted by bands of elastic material which will normally hold the axle in the upper part of the vertical slot but yield downward in its guiding slot relative to the wheel when striking some obstruction after which the elas-

tic bands will tend to restore it to its original place. In other words, the combination permits (relative to each other) the axle to move downward and the wheel to move upward under heavy loads or shocks.

The design of the plaintiff is comparatively simple. The diagram of Fig. 1 of the findings shows in the center the axle marked 1 and the slot in which it moves. The axle is shown suspended on elastic bands marked 25 which pass on the underside thereof and up over a rounded part upon the inner periphery of the wheel. The outer periphery of the wheel is permitted to turn freely upon roller bearings mounted on the non-rotatable part of the wheel. These bearings are marked in the figure 17, 18, and 19. This design, as stated above, permits the axle and the inner part of the wheel as a whole to have a relatively vertical movement.

The defendant contends that all of plaintiff's design was anticipated by the prior art and showed no invention. A skilled patent commissioner of this court so found upon the presentation of the evidence. The plaintiff insists that this finding is erroneous but upon a careful examination of the evidence and the case presented, we think the commissioner was clearly right.

The claims in suit are set out in Finding 6 and we do not think it is necessary to repeat them.[1] Long prior to the Martin patent, builders of aeroplanes had equipped them with devices in various forms intended to accomplish the same purpose as the plaintiff's patent and in the various mechanisms used had shown the equivalent of the essential features of the patent of plaintiff. The contention of the plaintiff, however, is in substance that none of these devices exhibited precisely the same combination as shown in his patent, that this combination was therefore new, and that as it was a useful combination it showed invention and made his patent valid. The feature of plaintiff's patent which he argues supports this claim is the location of the elastic bands which are used to enable the wheel to take up or absorb any shocks which may be encountered. Every-

[1] It should be noted that Nos. 1 and 2 of the claims in suit do not contain the limiting phraseology directed to the location of the shock absorber elements within the tire faces or planes of the side faces of the wheel.

thing else in the patent pertinent to this issue is unquestionably shown by prior devices.

The findings set out in detail a number of patents which disclosed a wheel, the outer part of which was rotatable and the inner part non-rotatable having an axle structure also non-rotatable but capable of relative vertical movement. The use of elastic bands as the shock absorbing element in aeroplane wheels was disclosed in the prior patent of Loening set out in Finding 14 which used a wheel of the type described above. The shock absorbing device of plaintiff's patent was located wholly within the planes of the side faces of the wheels, thereby reducing air resistance when the plane was in motion. Other inventors had previously so located the shock absorbers but had used some type of springs instead of elastic bands, and the elastic bands used in the Loening patent were not located within the plane of the wheel. It is therefore argued that in so locating the shock absorbers and using elastic bands as the shock absorbing element, the plaintiff created a new and valuable combination which constituted invention and entitled him to a patent.

A prior art construction is exemplified by the shock absorber used on aeroplanes designated as the Curtiss CR1 and CR2. This construction is diagrammed in Fig. 4 of the findings. It shows the use of an elastic cord in the shock absorbing mechanism wrapped about two non-rotatable members guided upon each other by means of a slot for substantially vertical movement, and composed respectively of the axle shaft and the chassis members adjacent to the wheel.

A wheel known as the Ackerman aeroplane wheel was in public use on aeroplanes in 1916 and formed the basis of a patent issued in that year to Strietelmeier. This wheel also had a rotatable rim carrying a tire and the rim was connected to a rotating hub-member by means of a plurality of loop-like steel spring spokes which furnished the means of absorbing the shocks as more particularly described in Finding 17. These shock absorbing spokes were located within the planes of the sides of the wheel. The advantage of such a construction in minimizing wind resistance was

known to those skilled in the art prior to the date of the patent in suit and had been specifically referred to and discussed in a publication entitled the "Aerial Age Weekly" in the issue of August 20, 1917, as further shown in Finding 17.

Patents disclosing prior art wheels of the same general type as the wheel in the patent in suit are shown in Finding 13 to have been issued to four different parties. These patents also disclose a wheel structure comprising a rotatable part and two non-rotatable parts guided upon each other for relative vertical movement by means of a vertical guide slot (or its structural equivalent) and resilient or elastic means comprising metal springs for resisting said movement, with all of the elements substantially located between the planes of the side faces of the wheel. A diagram of the Leffort patent, Fig. 3 of the findings, is illustrative of this prior art structure and it will be seen that the claims of the patent in suit differ from the disclosure contained in these patents only in the designated use of "wrapped elastic material" or "elastic bands" wrapped around the rounded parts as the shock absorbing element instead of the spiral elastic springs.

The relative advantages and disadvantages of elastic cords of rubber as compared with metallic springs for shock absorbers on aeroplanes were well known prior to the filing of the application which matured into the patent in suit and are fully set forth in an article by J. C. Hunsaker contained on pages 78 to 82, inclusive, of the publication entitled "Aviation," in the issue of September 1, 1916. With this information at hand, it is obvious that the utilization of either rubber cords or metallic springs with their associated mountings was within the choice of those skilled in the art, and that to substitute an elastic material or elastic bands wrapped around rounded parts for the elastic or resilient metal springs in the prior art wheels of the type referred to in Finding 13, or to relocate the rubber shock absorber of the Curtiss type CR1 and CR2 (Finding 15) within the plane of the wheel, would require only mechanical skill and would not contribute any new or unexpected result to the art.

We think it is plain that if the location within the plane of the wheel of a particular type of shock absorber already known in the art was of any practical and substantial advantage (a matter as to which there seems to have been some dispute) it did not require any invention to devise a method for so placing it. Ordinary mechanical skill would seem quite sufficient. The use of elastic material or elastic bands wrapped around rounded parts, instead of elastic or resilient metal springs, was merely an adoption of prior art as shown by the patent to Loening (1915), and the publication entitled "Flight" (1912) showed a shock absorbing device, more particularly described in Finding 14, in its essential features similar to the plaintiff's device. To change the location of the rubber shock absorber of the Curtiss type CR1 and CR2, as illustrated by Fig. 4 of the findings, from adjacent to the wheel to within the plane of the wheel would, as stated in the findings, require only mechanical skill and not invention.

It is said that there is no evidence to support this conclusion. It is a sufficient answer to say that both methods had been made known by patents and publications and both put to practical use and there is nothing to indicate any mechanical difficulty in making the change. It is also argued that the patent on the Ackerman wheel contains no suggestion of elastic bands or cords in the mechanism of the shock absorber and that prior patents making use of elastic bands do not contain any reference to the matter of placing the shock absorbing mechanism for aeroplanes within the plane of the wheels. But the patent on the Ackerman wheel gave rise to an article published in the Aerial Age Weekly (1917) calling attention to certain advantages of locating the shock absorbing mechanism within the plane of the wheels. With this purpose in mind, the designers of aeroplane wheels had only to take the device employing elastic cords in the shock absorber as shown by prior patents and change its location to make it conform with the theory set forth in the article in the Aerial Age Weekly quoted in Finding 17. There is, as plaintiff contends, no direct testimony that this involved only mechanical skill. No witness testified to that effect but the evidence as a whole makes this conclusion so manifest that

direct testimony by an expert is not required in order to enable the court to reach the conclusion set out in the findings.

Summarizing the evidence, we find that a wheel with an outer rim and tire rotatable upon an inner part not rotatable was not new. It was not new to have a non-rotatable axle mounted in a guide slot so as to provide for a substantially vertical relative movement between the two non-rotatable parts. It was not new to have the vertical movement resisted by elastic bands wrapped around portions of the two non-rotatable parts in such a manner as to permit a yielding under heavy loads or shocks; nor was it new to use rubber for the elastic material in the bands. It was not new to have the shock absorbing element placed within the side planes of the wheel, and whatever advantage there was in so placing it was well known. While a shock absorber using elastic bands had not been so located, such an operation would naturally be suggested to those skilled in the art who wished to minimize the wind resistance of the wheel.

The case of *Loom Co.* v. *Higgins*, 105 U. S. 580, is cited in support of plaintiff's contention that his combination was patentable and showed invention, but we think the language of the opinion shows that it is not applicable to the facts of the case before us. In that case the portion of the opinion quoted by counsel for plaintiff shows that the court considered that Webster (whose design was embodied in the patent in suit therein) was the first to see the value of the combination that formed the basis of his patent and the first to bring it into notice and urge its adoption. In the instant case, prior to the issuance of plaintiff's patent, there were two kinds of shock absorbers which were well known: one used springs located within the plane of the wheel; and the other rubber bands on the same general plan as that described in plaintiff's patent but located outside of the plane of the wheel. Whereupon, scientific journalists discussed the advantages of the location of the shock absorbers within the planes of the wheel without reference to the type used. It was, we think, quite apparent that this could be done with either type by those skilled in the art.

Syllabus

Our conclusion is that claims 1 and 2 of the patent of plaintiff are invalid because of complete anticipation, and claims 3 and 4 are invalid for want of patentable novelty or invention over the prior practical, patented, and published art as found by the commissioner. This makes it unnecessary that we should determine whether the evidence sustains the other defense set up by defendant, namely, that the plaintiff for a valuable consideration had granted to the United States an irrevocable but non-exclusive right and license to make, have made, use and sell, for Governmental purposes only, any and all of the devices covered by the patent upon which the suit is based.

Judgment will be entered dismissing plaintiff's petition and for the cost of printing in favor of the defendant. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

GENERAL CONTRACTING CORPORATION v. THE UNITED STATES

[No. 42796. Decided January 9, 1939]

On the Proofs

Government contract; extra expense.—Where contract for construction of a lock in the Kanawha River called for a test of certain valves to ascertain if said valves would lower and raise the gates of the lock, without specifying the character of such test, and where plaintiff successfully made a mechanical test, and was then required, at extra expense, to make an oil test, it is held that plaintiff is entitled to recover.

Same; calculations in accordance with the contract.—Where contract provided that steel castings should be within a given percentage of the theoretical "weight as calculated from the drawings," it is held that a different method of calculating the weight, or a deduction from the weight calculated in accordance with the method prescribed in the contract, is not allowable; even if a different method may be in accord with good engineering practice, it is the contract that governs.

Same; changes.—Contract provisions are not susceptible to modification or change when they expressly state what may be done thereunder and the method and procedure for making changes; where the record does not sustain a contention that contractor could not possibly observe the provisions of the specifications, and where a choice of method was permitted and the contractor adopted the more expensive way, contractor may not recover.

Same; misrepresentation of conditions.—Where the record does not support a holding that a claimed misrepresentation of conditions actually misled the contractor, it is held that there is no basis for recovery.

Same.—Where a contractor made no investigation of its own as to subsurface conditions, and there is no positive and convincing proof of misrepresentation by the defendant as to said conditions, it is held that the plaintiff cannot recover.

The Reporter's statement of the case:

Mr. William Delaware Harris for the plaintiff. *Palmer, Stellwagen, Scott & Neale* and *Messrs. Seiforde M. Stellwagen* and *J. Leonard Townsend* were on the briefs.

Mr. Edgar T. Fell, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a Delaware corporation with its principal place of business in Pittsburgh, Pa.

2. Pursuant to advertisements for bids under date of about January 7, 1931, plaintiff entered into a contract March 27, 1931, with the United States, which provided under the statement of work to be performed that

> The contractor shall furnish all labor and materials, and perform all work required for constructing one lock only (the riverward one) of the proposed twin locks in the Kanawha River opposite Marmet, West Virginia. The work includes the guard walls, lock gates, Stoney gate valves, gate and valve operating jacks and machinery piping and control valves, all metal work noted on the drawings and such incidental work needed or ordered in writing by the contracting officer, for the consideration of the sum based on designations and unit rates specified in schedule appended to the specifications—serial No. 31120—in strict accordance with the specifications, schedules and drawings, all of which are

made a part hereof and designated as follows: * * *. [Then followed a list of the specifications and drawings.]

The contract provided that the work should be commenced within ten days after the receipt by the contractor of notice to proceed and should be completed by July 31, 1932. Plaintiff was notified February 12, 1931, that it had been awarded the contract for the work referred to above and began work under the contract in February 1931. The contract and specifications are in evidence as plaintiff's Exhibit 1 and they are incorporated herein by reference.

3. In general, the contract was for one part of a project by which it was contemplated that two locks, known as Locks A and B, would be constructed. Plaintiff's contract covered Lock A, which included the construction of the outer or riverward wall of Lock A, as well as the intermediate wall which would serve as the dividing wall between Lock A and Lock B. One provision of the contract was that plaintiff should build a cofferdam around the entire area to be occupied by both locks, and remove the cofferdam at the completion of Lock A, or permit it to remain in place, at the election of defendant. A definite determination as to the construction of Lock B had not been made at the time plaintiff entered into its contract for the construction of Lock A. It was later determined to permit the cofferdam to remain in place and to proceed with the construction of Lock B, advertisements for bids therefor being issued in September 1931. Plaintiff was an unsuccessful bidder for Lock B and the contract was awarded to another party.

4. In advertising for bids for Lock A defendant set out certain estimated quantities for the various units, but stated that such quantities were given only to serve as a basis for comparison of bids and that the defendant reserved the right to increase or decrease the quantities by such amounts as would complete the work contemplated by the contract. Based on the estimated quantities and the unit prices bid by plaintiff, the total contract price for the work was $799,462.

Plaintiff proceeded to carry out the work under the contract and completed it about December 18, 1931, and not later than

January 3, 1932, which was well in advance of the completion date of July 31, 1932, fixed in the contract. Plaintiff was paid $806,035.07 for items mentioned in the contract and $44,786.60 on account of extra work ordered by defendant. Final payment on account of these two amounts was made February 16, 1932. December 31, 1931, January 25, 1932, and February 16, 1932, plaintiff submitted certain claims for additional payments, a total of fifteen items making up the three claims. After due consideration and review by defendant's contracting officer and superior officers concerned, the Chief of Engineers recommended allowances in the total amount of $6,162.14 and forwarded the claims with his recommendation to the General Accounting Office for settlement. The General Accounting Office reviewed the claims and on January 5, 1933, allowed them to the extent of $5,364.71. Plaintiff thereafter instituted this suit on account of certain items not allowed, the facts with respect to which are shown hereinafter under separate headings.

Testing Stoney Gate Valves

5. Among the items of work to be performed by plaintiff was an item for the construction and installation of six Stoney gate valves. Four of these valves were for the operation of Lock A, two being located in the river wall and two in the intermediate wall between Lock A and the proposed Lock B. The other two valves were for the operation of Lock B when constructed and they were located on the land wall side of the intermediate wall. All of the valves were designed for operation by oil pressure which was to be supplied by an oil pump. They were connected with blades or gates and controlled the filling and emptying of the lock chamber by raising or lowering the blades or gates, as desired. Plaintiff constructed and installed the six valves at the points mentioned above.

6. Paragraphs 130 and 131 and a part of paragraph 139 of the specifications read as follows:

> 130. Testing Stoney Gate Valves.—After the valve blades have been installed they shall be raised and lowered to assure that the clearances specified on the drawings have been provided, and that the controlling devices are functioning properly.

131. Measurement and Payment.—All items shown on drawings Nos. 24/1 to 13, inclusive, are to be furnished and erected and the control valves installed as stated in paragraph 128 under the lump sum bid for Stoney Gate Valves. Sixty per cent of the contract price will be paid when all the items have been delivered and accepted. The remaining forty per cent will be paid when installed and tested to the satisfaction of the contracting officer.

139. All oil pipes, valves, and fittings, shown on the drawings and necessary or desirable for operating the lock gates and the Stoney gate valves, shall be furnished and installed by the contractor, except that the United States will complete the installation between the ends of the piping shown on drawing No. 20/12 and the source of power.

Upon the completion of the installation of the six valves plaintiff made tests, satisfactory to defendant's representatives, of the four valves which were installed for the operation of Lock A. These tests were made by use of oil pressure with a hydraulic oil pump. However, when plaintiff came to make a test of the two valves which had been installed for the operation of Lock B, plaintiff employed a mechanical test, in which the valves were raised and lowered by means of a derrick or crane with a block and fall arrangement. When that mechanical test was made, piping had not been carried to these two valves and a satisfactory test by oil pressure could not be accomplished without the installation of that piping. The contract drawing for the "Piping Layout" (Drawing No. 20/12) contained a notation showing the "end of piping for Lock A contract" at a point before the piping reached the Lock B valves in question and a further notation that "Piping shown on land and intermediate walls used for the operation of Lock B not included in this contract." A test by the mechanical means used by plaintiff was sufficient to show that the valves had been constructed and installed in a satisfactory manner, and in order to carry out the requisite test by oil pressure it was necessary to extend the pipe lines to the valves.

Defendant refused to accept the work without an oil pressure test and insisted that the necessary pipe be in-

stalled and that a test be made by the use of oil pressure. Plaintiff carried out this work under protest, installing the necessary piping and equipment to operate these valves and performing the necessary work. Tests were then made by the use of oil pressure with a hydraulic oil pump in a manner similar to that in the case of the valves for Lock A. As a result of the controversy and protest by plaintiff, defendant paid plaintiff for piping, valves, and fittings incidental to such installation, plus 10 per cent profit, and change orders were issued pursuant to which payments were made to plaintiff therefor in the amount of $895.00. Defendant, however, refused to pay $20.85 rental of a pump required for the tests and $192.17 on account of labor costs, and these amounts have not been paid to plaintiff.

Preparing Girders for Enameling

7. One of the items included in plaintiff's contract was the furnishing of two large steel box girders, otherwise known as needle beams. These beams were to be furnished at a unit price per pound which included all items connected with the manufacture, painting, and installation of the beams. Shortly after the contract had been executed defendant notified plaintiff that these beams would not be required. Later, however, defendant notified plaintiff that the beams would be required and plaintiff ordered its subcontractor to furnish them.

8. In order to furnish the needle beams, drawings were prepared, for use by plaintiff's subcontractor, from the original contract drawings, and these drawings were approved by defendant's representatives. Through error the original contract drawing contained a notation—"Entire Girder to be painted under same requirements for Lock Gates"—and that notation was placed on the new drawings as prepared for use by the subcontractor. Paragraph 93 and a part of paragraph 94 of the specifications provided as follows:

93. Shop painting.—The surfaces of all steel and iron work except steel and iron castings, reinforcing rods, anchor rods, pipe, and embedded metal as indicated on the drawings, shall be painted in the most thorough

manner to prevent corrosion. All scale, rust, dirt, and oil shall be removed by scrapers, wire brushes, sand blast, or other effective methods. When the surfaces are perfectly clean, warm, and dry, they shall be given two coats of red lead paint of slightly different shades, except mitering lock gates which shall be given one coat of bituminous priming solution equal to the "Bitumastic" solution manufactured by the Wailes Dove-Hermiston Corporation. All surfaces inaccessible after work is riveted up shall be given one coat of the same kind of paint before assembling.

94. Field painting.—All steel and iron shall be kept clean and free from rust. The surfaces of parts painted in the shop shall be repainted or retouched from time to time when in the opinion of the inspector this be necessary, using paint of the quality specified for the shop coat.

After erection, all rust spots, all places where the paint has been rubbed off, and all field rivet heads shall be cleaned and painted with paint of the same quality specified for shop painting. When this has become dry, all exposed steel and iron surfaces except piping and mitering lock gates shall be given one coat of red lead paint. Piping shall receive two coats of red lead paint after testing. The mitering lock gates shall receive two coats of bituminous priming solution and one coat of bituminous enamel equal to the "Bitumastic" solution and enamel manufactured by the Wailes Dove-Hermiston Corporation, the enamel to have a thickness of about $\frac{1}{16}''$. The enamel shall be applied hot after the priming solution has dried to a tacky consistency. * * *

Under those specifications steel that was exposed to the weather, except lock gates, was to be painted with red lead, and the two needle beams, which upon installation were exposed to the weather, should have been painted in that manner. Through error, however, on the part of a draftsman of the defendant, as indicated above, a notation was placed on the drawing for the construction of these beams, which provided that they should be painted in the same manner as lock gates, that is, with bitumastic paint.

9. On the basis of the drawings as furnished to plaintiff, plaintiff furnished the needle beams and had them delivered on the job painted with one coat of bitumastic solution.

The error on the drawing, referred to above, was then discovered for the first time by representatives of both parties, and a discussion followed as to the best solution of the situation presented. Defendant's representatives objected to the use of the bitumastic instead of red lead as prescribed by the specifications. It appeared, however, that in order to apply red lead it would be necessary to remove the bitumastic solution before the two coats of red lead could be applied and that a less expensive operation would be to apply a coat of bitumastic enamel to the existing coat of bitumastic solution. In view of this situation defendant's representative indicated a willingness to accept the beams as painted by the latter method, which was agreeable to plaintiff's representative, and defendant's representative verbally instructed plaintiff's representative to paint the beams in that manner. Those instructions were carried out, and the beams, painted in that manner, were accepted by the defendant. However, at or about the time the painting was completed, plaintiff made written demand on defendant for $106.20 on account of applying the coat of bitumastic enamel, such amount being set out as follows:

Cost of Needle Dam Girders painted as directed	$150.00
Less cost of Labor & Paint as specified	54.78
	95.22
Bond	1.02
Sales Tax	.32
	96.56
10% Profit	9.64
Total	106.20

The item of $150 represents the cost of applying the coat of bitumastic enamel, and the item of $54.78 a reasonable estimate of the cost of labor and paint necessary to have painted girders with red lead. The reasonable cost of removing the bitumastic solution which was on the beams when delivered on the job and of preparing the beams for the application of the red lead is not shown by the record.

Plaintiff's claim on this item was denied and no payment on account thereof has been made.

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Furnishing Steel Castings

10. Under the contract and specifications plaintiff was required to furnish and install in the lock walls certain steel castings, known as "Class A Castings," for the purpose of protecting the walls from damage and also the boats passing through the locks. They were embedded in the concrete of the lock walls and in order to attach them to the wooden forms as the concrete for the walls was being poured, holes were provided in the castings. After the concrete was poured and the forms removed, the holes no longer served a useful purpose and they were required to be filled as hereinafter shown. In addition, the castings contained holes which were useful as a permanent part of the structure for attaching hairpin anchors and as openings for certain required bolts.

These castings were to be paid for at 5½ cents per pound, but it was impracticable to weigh each piece in the field. Under the specifications (paragraph 71) it was provided that when material was purchased and paid for by weight "no payment will be made for material in excess of the prescribed limit of variation from the calculated weight of any piece." Another provision of the specifications was that "Unless otherwise authorized by the contracting officer, each casting shall be within 7½ per cent of the theoretical weight as calculated from the drawings."

11. During the early period of operation under the contract some question arose as to the basis on which weights would be determined for the purpose of payment on Class A castings, and on April 3, 1931, plaintiff wrote defendant in part as follows:

> We are requesting your approval on accepting certified shipping weights as payment weights for armor [Class A] castings. Your immediate advice on this will be appreciated.

Defendant's representative replied to that request on April 7, 1931, as follows:

> With reference to the acceptance of certified shipping weights as payment weights for armor castings, you are advised that in the case of these castings, as well as in

the case of other materials for which inspection may be required, this office will require certification of weights at the point of manufacture by the Government inspector assigned; otherwise certified shipping weights may be accepted as payment weights.

12. Plaintiff secured these castings from a subcontractor and payments were made to plaintiff on account of the castings furnished on the basis of the shipping weights as given by plaintiff's subcontractor up to July. It developed that castings were being furnished whose shipping weights were in excess of the estimated weights as previously prepared by defendant. Controversy then arose as to the proper basis for computing theoretical weight, the dispute being largely over whether in computing the theoretical weight of a given casting, provision should be made for a deduction on account of core holes.

In usual engineering practice castings are paid for on the basis of actual weight. By theoretical weight is meant a weight which is arrived at by computing the net volume of a casting and multiplying that net volume by a unit weight, depending on the specific gravity of the material used. In order to arrive at the net volume all voids which appear in the castings are subtracted.

13. The contract drawings supplied to plaintiff by defendant for furnishing these castings showed weights calculated on certain castings and these weights were determined without deductions for core holes. As shown in finding 10, the holes in the castings served various purposes, such as provision for attaching a form to the casting in connection with pouring concrete, means for attaching hairpin anchors and openings for bolts. In all instances where the holes were not filled with hairpin anchors or bolts, which were paid for as structural steel, plaintiff was required to fill the holes with iron or lead slugs and no payment was made to plaintiff therefor.

14. The total weight of the castings furnished by plaintiff was substantially in excess of a theoretical weight of the castings prescribed for the job whether such theoretical weight be computed with or without deduction for core holes and even after allowing an overrun in weight of 7½ percent.

The total theoretical weight of the castings furnished by plaintiff, as computed after making deductions for core holes and after adding the allowed overrun of 7½ percent, amounted to 616,393.5 pounds, and defendant paid plaintiff at the contract price for that weight of castings. Plaintiff computed the theoretical weight as 583,080 pounds and added to that amount the allowed overrun percentage of 7½ percent, arriving at a total weight for which payment was demanded of 626,811 pounds. The difference between the theoretical weight computed by defendant, with allowed overrun, that is, 616,393.5 pounds, and the total weight computed by plaintiff, 626,811, is 10,417.5, and that difference is accounted for to the extent of approximately 90 percent by the fact that plaintiff did not make a deduction for core holes in its computation, whereas core holes were deducted in defendant's computation. Where the actual weight exceeded the theoretical weight, an overrun tolerance or differential of 7½% may be added to the theoretical weight. Plaintiff's demand for payment on account of weight of material in excess of that computed by defendant was refused by defendant.

Maintaining Pumping Plant

15. During the progress of the work defendant's contracting officer decided that a concrete apron, an item not included in the original plans, should be constructed at the lower end of the locks to prevent the water which was discharged by the locks from undermining the lock walls. In September 1931 defendant's representative gave plaintiff verbal instructions to carry out this work and plaintiff performed the work as directed. After the work had been completed defendant on December 16, 1931, issued an extra work order, dated as of September 15, 1931, providing for the payment for the work on the basis of cost of labor and material plus 10 percent. While the extra work order showed an estimated cost of the work of $11,000, it was understood by both parties at the time the order was signed that that amount was an estimate and that representatives of the two parties would undertake to reach an agreement as to the exact cost

involved. Shortly thereafter plaintiff submitted an itemized list of costs for this work which, together with an additional allowance of 10 percent, amounted to $11,348.88. Defendant paid $10,989.77 on account of such work and has refused to make payment of any further amount. The greater part of the difference, and the only item in dispute for which claim is now being made, is an item of $300, representing a part of the cost of maintaining and operating plaintiff's main pumping plant during the period when the extra work was being performed.

16. The concrete apron was constructed within the limits of the area inclosed by plaintiff's main cofferdam. However, in order to carry out this extra work, two sub-cofferdams were constructed around this particular work and that area was kept unwatered by two pumps, the cost of whose operations was recognized and paid for by defendant as extra work. During the time the extra work was being done other work was being performed on the job which required the continuous operation of the main pumping plant. The cost of operation of the main pumping plant was not appreciably increased by reason of the extra work, and the plant was not required to operate for a longer time because of the extra work that was performed.

Anchoring Cofferdam

17. In constructing the upper arm of the main cofferdam in accordance with the plans and specifications it was necessary to extend the cofferdam into the bank in order to prevent inundation of the cofferdam during ordinary rise in the river. While the cofferdam was being constructed at that point E. B. Roeser, who claimed that he owned certain adjacent property, complained to plaintiff's and defendant's representatives that unauthorized use was being made of his property by plaintiff and/or his subcontractors through the driving of trucks over it and the dumping of materials thereon, and in other ways. Defendant's representative pointed out that the cofferdam was being constructed between the low and high river mark and refused to make any payment to the alleged owner on account of any use of his prop-

erty. Plaintiff's representative, however, entered into an agreement on November 17, 1931, for the use during the period of construction of the lock of a certain designated lot adjoining the place where the cofferdam extended into the bank of the stream, such agreement to terminate December 31, 1931, in consideration for the payment by plaintiff to that individual of $75. Plaintiff paid that amount and now demands reimbursement from defendant, which has been refused.

Excess Cement

18. Under the contract and specifications plaintiff was required to furnish all labor and material incident to supplying concrete necessary for this job. Paragraph 50 and a part of paragraph 51 as revised of the specifications read as follows:

> 50. Composition of concrete.—Concrete shall be composed of cement, fine aggregate, coarse aggregate and admixture, well mixed and brought to a workable consistency by the addition of water. The mix will be designed to secure the most economical concrete practicable within the specified limits, having a minimum compressive strength of 2,400 pounds per square inch at the age of twenty-eight (28) days.
>
> 51. Proportioning.—(a) Method.—All classes of concrete shall be proportioned by the water-cement ratio method.
>
> (b) Control.—The exact proportions of all materials entering into the concrete shall be determined by the contractor at frequent intervals as directed by the contracting officer. The contractor shall provide all equipment necessary to positively determine and control the relative amounts of the various materials. The proportions shall be changed whenever necessary to obtain the specified strength and workability, and the contractor shall not be compensated because of such changes.
>
> (c) Cement content.—Each cubic yard of concrete shall contain not less than 5 bags of cement.

19. While under the above specifications the proportions of materials for mixing the concrete were to be determined by plaintiff as directed by the contracting officer, the mixtures were prescribed by defendant's representative either at

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the request, or with the acquiescence, of plaintiff. Each mixture was designed on the basis of producing 2 cubic yards of concrete from each "batch." The quantities of the several ingredients for the first prescribed mixture were as follows:

Cement	10 bags.
Sand	24.1 cubic feet.
Gravel	39.8 " "
(Cement) Admixture	½.
Water	65 gallons.

As one prescribed mixture was being followed, measurements were made of the yield of concrete obtained therefrom as well as laboratory tests of the strength and other qualities of the concrete being produced. Minor changes were made from time to time in the prescribed mixtures, depending upon the results shown from the use of a given mixture. From the first mixture used a yield of concrete of approximately 98 percent was obtained, which was the lowest yield produced. The average yield on the entire job was approximately 99.5 percent which is recognized as a very satisfactory result in work of this character.

20. Plaintiff poured 23,935 batches in order to produce the concrete required on the job. Theoretically those batches, with a perfect yield, would have produced 47,890 cubic yards. The actual concrete computed for the job was 47,626.7 cubic yards, and from that amount plaintiff agreed to a deduction of 81 cubic yards on account of concrete used where the rock foundation had been cut below an allowed depth. Defendant then paid plaintiff at the contract price for 47,545.7 cubic yards of concrete (47,626.7 less 81 cubic yards).

Plaintiff made demand for an additional payment on account of an alleged excessive use of 500.47 [1] barrels of cement in producing the concrete for the job, at $1.64 per barrel, which defendant duly refused. The alleged excess used is based in large part upon a theoretical perfect yield from the prescribed mixtures. The difference between the concrete paid for and that shown on the basis of a perfect yield from the mixtures is reasonably accounted for in this instance by

[1] In the several demands for payment, in the petition and at the hearings, the excess cement, for which payment is sought, has varied somewhat, but the amount shown above is the final amount claimed.

losses common to work of this character due to shrinkage, spreading of forms, loss at mixing plant, and other similar causes.

Construction of Cribs and Monoliths

(Increase of permanent work within cofferdam)

21. Paragraph 21 of the specifications provided as follows:

> 21. Cofferdam.—The cofferdam shall be of the kind generally known as the "box type." For all parts except the upper guard walls, a box cofferdam shall be built to an elevation not less than eight (8) feet above the normal pool above Dam No. 5. The width between sheeting at any point of the box cofferdam shall not be less than twenty feet.
>
> The upper guard wall shall be constructed without a cofferdam. A price for the cofferdam shall be submitted on the basis of linear feet of permanent work as given in paragraph 23.

Paragraph 23 of the specifications made the following provision for payment for the cofferdam and the measurement which would be considered as a basis for such payment:

> 23. Payment and measurement.—Payment for the cofferdam will be made separately for its construction and maintenance, and for its removal, on the basis of the number of linear feet of masonry in the lock and the lower guard wall. This length will be 935 linear feet. The cofferdam will be removed by the contractor and payment for same made only in case its removal is ordered by the contracting officer. The total number of linear feet of cofferdam to be paid for will be as given above except in case the length of the permanent work be decreased or increased, when the cofferdam to be paid for will decrease or increase in a corresponding amount. Bidders are cautioned to estimate with care the amount and cost of building and maintaining the cofferdam required and its removal if ordered. Since payments are based on the linear feet of permanent work inclosed, the price per linear foot bid should be such as will cover the costs plus profit for all the cofferdam reduced to unit prices per linear foot of permanent work as stated above.
>
> An estimate will be given for 75 per cent for the construction and maintenance of the cofferdam when it is completed and entirely pumped out so work may proceed on any part of the foundation of the permanent

> work to be built therein. The remaining 25 per cent will be estimated when the inclosed work is completed and accepted. Estimates for the removal of the cofferdam, if ordered, will be made monthly for the proportionate amount removed of the linear feet of cofferdam paid for under the item for its construction and maintenance. The amount of each bid received for the work included in these specifications will be based on the assumption that the cofferdam will be removed, though its removal will be at the option of the contracting officer, as previously stated. If, on the completion within of the work covered by these specifications, the cofferdam is not ordered to be removed by the contracting officer, it shall become the property of the United States without any further compensation to the contractor, either for material left in the cofferdam or on account of any loss of anticipated profit. * * *

Plaintiff bid for the construction of the cofferdam on the basis of $125 for each linear foot of permanent masonry work within the cofferdam. The permanent masonry work in the lock walls and lower guard wall was built by plaintiff, as prescribed in the specifications, in a length of 935 linear feet, such length being neither increased nor decreased during the period of the operations, and defendant paid plaintiff $116,875 for the construction of the cofferdam, such amount being arrived at by multiplying the total length of permanent masonry work in the lock walls and lower guard wall—that is, 935 feet—by the unit price of $125 per linear foot.

22. While, as shown in paragraph 21 of the specifications quoted above, the upper guard wall was to be constructed without a cofferdam, plaintiff determined, at or about the beginning of the job, to postpone construction of the upper guard wall until after the construction of the cofferdam and certain of the permanent work inclosed therein, for the reason that that was a more practical and less expensive manner in which to carry out the work, provided the contracting officer elected to remove the cofferdam by the time plaintiff came to construct the upper guard wall. The upper guard wall could have been constructed prior to the completion of the main cofferdam. The contracting officer, however, did not elect to order the removal of the cofferdam, and on June 19, 1931, plaintiff submitted to defendant's representative plans

for the construction of a portion of the upper guard wall within the cofferdam, and in a letter transmitting the plans stated:

> We enclose two copies of our drawing 195–80 showing details of construction for the crib wall foundation under the upper guard wall. Please give this your attention and return to us one print approved, on receipt of which we will forward the necessary copies for your use.
>
> You will note that it is our intention to complete as quickly as possible the masonry to station 1–73 A, thus increasing the linear feet of permanent work inclosed in the cofferdam from 935 ft. to 982.5 ft.
>
> Any expedition that you can afford the approval of this part of the work will be greatly appreciated.

The contracting officer did not reply to that request for approval of the manner in which that work was to be done except that defendant's representative on the job verbally advised plaintiff's president that plaintiff could proceed with the construction in that manner if plaintiff desired, but that defendant would not recognize any extension of permanent work within the cofferdam on that basis. Plaintiff built a portion of the upper guard wall within the cofferdam in accordance with the plans as submitted on June 19, 1931—that is, 47.5 feet—such construction being carried out under the supervision, and with the full knowledge, of defendant. Upon the completion of the work plaintiff made demand upon defendant for additional payment on account of the construction of the cofferdam, on the ground that that portion of the upper guard wall which was constructed within the cofferdam was permanent work therein, and that therefore a further payment should be made for the cofferdam on the basis thereof—that is, $5,937.50 (47.5 feet at $125). The demand for additional payment was refused by defendant.

Erecting New Cofferdam

23. After plaintiff had constructed the portion of the upper guard wall within the main cofferdam as described in the previous findings under the item "Construction of Cribs and Monoliths," it became necessary to connect that portion of the upper guard wall within the main cofferdam to the portion of the upper guard wall without the main

cofferdam by projecting the upper guard wall through the main cofferdam, since as shown in finding 3 the contracting officer had elected to retain the main cofferdam for the purpose of constructing Lock B. That work was carried out by plaintiff by cutting through the main box cofferdam and erecting between the end of the upper guard wall inside the cofferdam, and the end of the upper guard wall outside the cofferdam, interlocking steel pile walls and making appropriate excavation therein, thereby constructing a sub-cofferdam within the upper arm of the main cofferdam. After that work had been done the two sections of the upper guard wall heretofore referred to were connected at that point through the main cofferdam, and the main cofferdam was joined to the upper guard wall at the points where the upper guard wall was projected through the cofferdam.

The cost to plaintiff of cutting through the main cofferdam and constructing the steel pile cofferdam within the main cofferdam for the purpose of connecting the two portions of the upper guard wall, as described above, was $4,182.72. Demand on defendant for payment of approximately that amount was made by plaintiff and refused by defendant.

Cost of Embedded Timbers

24. Paragraph 61 of the specifications made the following provision for the basis of measurement for payment for concrete:

> 61. Measurement for payment.—The payment for concrete shall include the use of all equipment, tools, material, falsework, forms, bracing, surface finish, labor, and all other items required to complete the concrete work, except the reinforcement and embedded anchorages, which will be paid for separately. Payment shall be made at the contract unit prices on the basis of actual volume within the neat lines of the structure as shown on the plans.
>
> In measuring concrete for payment no deductions will be made for rounded or beveled edges or spaces occupied by metal work, or for voids less than 5 cubic feet in volume or less than 1 square foot in cross section. The price bid for concrete shall include all materials, forms, tie-rods, expansion joints, cement testing, and all incidental work.

In accordance with the plans and specifications the upper guard wall was constructed on a timber crib which was filled with rock. The crib was built of 10 inch by 12 inch timbers and the upper three feet of the crib were filled or covered with concrete. The crib timbers which extended into the concreted area were encased in the concrete. When payment came to be made for the aforementioned concrete defendant deducted 98.08 cubic yards from the volume of the concrete, the amount deducted being the cubic yardage of the volume of timbers that were encased in the concrete. This deduction was made by defendant on the basis of the specification quoted above, its interpretation being that while provision was made that no deduction should be made in measuring concrete for payment on account of "spaces occupied by metal work or for voids less than five cubic feet in volume or less than one square foot in cross section," such provision did not apply in this instance, for the reason that timber rather than metal was involved. The timber for which deduction was made had been paid for separately by defendant, and that was likewise true in cases where metal was encased in concrete for which no deduction was made by defendant.

25. On the basis of the cubic yards of the embedded timbers (98.08 cubic yards), deduction was made from amounts otherwise due plaintiff at the unit price for concrete of $8 per cubic yard, making a total deduction of $784.64. On appeal to the chief of engineers from the deduction made, recommendation was made by the chief of engineers that the amount deducted be paid. This recommendation was not followed by the Comptroller General and no payment on account thereof has been made.

Cost of Crib Timbers

26. After the completion of the crib for the upper guard wall a controversy arose between plaintiff and defendant as to the number of board feet of timber which had been used therein. Representatives of both parties made measurements and computations on which an agreement was reached that the total timber used amounted to 230,000 board feet. Payment had theretofore been made for 225,200 board feet.

Defendant later made payment on account of the difference between the two amounts, that is, 4,800 feet at $50 per thousand. Plaintiff made claim for an additional payment for 1,200 additional feet, which was denied. At the hearing the amount of the claim was reduced to 882 board feet, making the amount of the claim $44.10 (882 board feet at $50 per thousand). The record is insufficient to show that more timber was used than has been paid for.

Grouting and Preparing Rock Surfaces

27. Paragraph 24 of the specifications contains the following provisions with respect to the foundations for the work covered by this contract:

> 24. Foundations.—The character and positions of the proposed foundations for the different parts of the work are shown on the drawings. The United States, however, reserves the right to increase the depth, width, or strength of the foundations, if in the opinion of the contracting officer, conditions require such modifications. All rock surfaces for foundations must be freed from loose pieces and worked down to a firm, solid bed of suitable form satisfactory to the contracting officer.
>
> The foundation for the upper guard wall shall be prepared by dredging or otherwise removing all loose material above the bed rock or shale. Soundings to rock shall be taken by the contractor at sufficient intervals to determine accurately the bottom thickness of the transverse timbers of the crib so that the crib when sunk and resting on the rock will be approximately level.

Shortly after plaintiff began its work under the contract and before the main cofferdam was completely unwatered, defendant's contracting officer decided to have performed certain additional work not described in the original plans and specifications, namely, the grouting of the foundations under the lock wall. That work was deemed desirable in order to solidify the foundation rock on which the walls were to rest and also to reduce the amount of seepage under and through the foundations.

28. After the determination had been made to proceed with this additional work plaintiff was given verbal in-

structions by defendant's representative during the latter part of April 1931 to begin the work. After the area had been completely unwatered plaintiff proceeded to carry out those instructions. Shortly thereafter, May 11, 1931, an extra work order was issued to plaintiff in which the latter was requested to "furnish labor and material required for drilling, testing, and grouting the foundation as required and directed by this office." The work order provided further that plaintiff would be paid "cost plus 10 percent for material and labor and a rental for necessary equipment, all as determined by this office." Plaintiff accepted the work order May 14, 1931, and the chief of engineers approved it June 22, 1931. In general terms the work covered by the extra work order consisted of drilling holes to a considerable depth into rock foundation and then forcing liquid concrete into the holes by means of a pressure pump. These holes varied in depth from approximately 15 to 30 feet. Plaintiff carried out the work covered by the extra work order by about the first of July 1931, and defendant paid plaintiff therefor $15,577.79.

29. Upon completion of the work covered by the extra work order the next step in the operations with respect to the foundations was the preparation of the rock surfaces (under which the grouting work was done) for the placing of concrete thereon. Paragraph 53 (b) provided in part as follows, with respect to the placing of concrete:

> (b) Placing.—Concrete shall be placed as soon as practicable after oiling the forms and before initial set has occurred, and in no event after it has contained its water content for more than thirty (30) minutes. Unless otherwise specified, all concrete shall be placed in the dry upon clean, damp surfaces, free from running water, and never upon soft mud, dry porous earth or frozen earth or upon fills that have not been subjected to approved puddling or tamping so that ultimate settlement has occurred. * * *

In the preparation of the surface and in the placing of concrete some difficulty was encountered by plaintiff in taking care of the water which came into the area where concrete was being placed and in making the rock sufficiently dry to satisfy defendant's representatives on the job. While

the grouting work which was done on the sub-foundations under the extra work order materially reduced the seepage through the rock foundations, water continued to come into the foundation area when plaintiff was preparing the work foundation for concrete. The water which came into these areas and which plaintiff was required to dispose of was reasonably attributable to leaks in the sandbag sub-cofferdams and to fissures or openings in the seamy or laminated rock which existed in some parts of the foundation.

In the advertisements for bids bidders were advised to visit the site and ascertain for themselves the conditions surrounding the construction work. Paragraph 3 of the specifications further provided:

> From surveys and borings made at the site it is assumed that conditions will be found approximately as indicated on the drawings, but bidders are advised to make their own investigations and estimates and to prepare their bids accordingly.
>
> Samples of core borings at the lock site are on hand at U. S. Engineer Field Office, Lock No. 5, Kanawha River, Marmet, W. Va., where they may be seen by prospective bidders. Bidders are advised to examine the cores and to judge for themselves the character of materials to be encountered.

The drawings which were furnished to plaintiff as well as to other bidders showed the general character of material revealed by the borings at various levels and at various places, such borings showing various subsurface materials to be encountered, including sand and gravel, shale, slate, and sandstone. The drawings with respect to sandstone did not, however, make any showing as to a seamy, laminated, or broken condition therein which might be encountered. Samples of core borings which were made available to all bidders, including plaintiff, showed with reasonable accuracy the stratified and laminated condition of the rock foundations which was encountered. Plaintiff did not make any examination of the core borings, nor did it make any borings on its own account to determine the character of the rock surface and subsurface conditions.

30. Plaintiff filed a claim for $5,800 on account of alleged extra work required in the disposal of water which came into

the area where it was placing the concrete and for making the rock surfaces unnecessarily dry before placing concrete thereon, which claim was denied by defendant. The situation with respect to the condition of the rock encountered was reasonably to be expected from the information made available for plaintiff at the time it submitted its bid, and defendant's representatives were not arbitrary nor capricious in enforcing the provisions of paragraph 53 (b) of the specifications quoted above with respect to the dry condition in which the rock surfaces must be prepared before placing concrete thereon.

The court decided that the plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

Plaintiff is a Delaware corporation. March 27, 1931, plaintiff entered into the contract involved in this case. The contract obligated the plaintiff to furnish all labor and materials and perform the work essential to construct for the United States a lock in the Kanawha River, opposite Marmet, in the State of West Virginia.

This suit is for the recovery of stated sums alleged to be due the plaintiff for performing work which the contract did not provide it should perform. Ten separate items are involved, and each exacts a discussion. Work under the contract and on the premises was performed by the plaintiff prior to the time limit prescribed, and the plaintiff has received payments as provided in the contract and additional payments for extra work ordered thereunder.

TESTING STONEY GATE VALVES

The contract required the plaintiff to construct and install six Stoney gate valves. Four such valves were to be installed in Lock A, the lock plaintiff was building, and two in Lock B which another contractor was building. The valves were to be operated by oil pressure and were connected with blades or gates and controlled when operated the filling and emptying of the lock chamber.

Paragraph 130 of the specifications provided for a test of the valves after installation. This paragraph did not specifically state that the test was to be made by the use of oil pressure. It simply said, "they shall be raised and lowered to assure that the clearances specified on the drawings have been provided, and that the controlling devices are functioning properly;" in other words, tested to ascertain if the valves would lower and raise the gates of the lock.

It is true paragraphs 131 and 139 of the specifications provide in detail for furnishing the necessary piping for oil in order to utilize it in operating the valves, but it is to be observed that the contractor was not to furnish and install piping for oil transmission to a point where an oil test could be made with respect to the two valves installed in Lock B. The contractor, it is admitted, did all that was required by the specifications with respect to the four valves installed in Lock A. These valves were subjected to an oil test and were satisfactory.

Notwithstanding the lack of facilities for oil testing the two valves in Lock B, and notwithstanding the success of the mechanical test of the same, the contracting officer exacted that an oil test of the same be made. The plaintiff protested against this exaction unless extra pay be allowed therefor. Some time in December 1931, after the work had been performed, the contracting officer allowed the plaintiff $895 for the piping, valves, and fittings furnished by plaintiff, plus a profit of ten percent, but declined to allow $20.85, the rental cost of an oil pump, and $192.17, the cost of labor incident to the same.

It is not contradicted that the cost to the plaintiff for doing this extra work is as stated in the record. The defense to this item is rested upon an alleged agreement between the parties providing that the defendant would pay for the materials to be furnished by the contractor plus, as stated, a profit of ten percent, the cost of labor incident to conducting the test to be borne by the contractor.

The issue resolves itself into a question of fact and the record upon this question is contradictory. The contractor was obligated to observe paragraph 130 of the specifications

(Finding 6). This paragraph does not expressly call for an oil test of the valves, unless an inference follows from the general words "the controlling devices are functioning properly." However, it is indisputable that no contractual obligation was imposed upon the contractor to conduct an oil test of the valves installed in Lock B. The oil test made by the contractor of the valves in Lock B was made upon the order of the defendant and for its benefit, and from the record the defendant, recognizing its own omission to provide specifications to cover the same, did in this instance fail to pay the full amount due the contractor, and a judgment for $213.02 will be awarded.

PREPARING GIRDERS FOR ENAMELING

Findings 7, 8, and 9 are amply supported by the record. The error in the specifications with respect to the painting of the large steel box girders did not occasion the plaintiff any monetary loss, and, in addition to this fact, the plaintiff agreed to the arrangement suggested by the defendant whereby the defendant was to accept the girders painted as the specifications provided instead of exacting that they be painted in another way.

The plaintiff is in no position to raise an issue as to what it terms a cancellation of the specifications which required the furnishing of the girders. It is true the contractng officer did notify the plaintiff that the girders would not be required, and subsequently changed his mind and ordered that they be furnished. The plaintiff did not protest this proceeding but acquiesced and proceeded to promptly meet the specifications. We do not mean to imply that a protest would have had the effect of giving rise to a cause of action; we recite the fact as additional evidence that the plaintiff acquiesced in what was done. No additional or extra work resulted from the order.

FURNISHING STEEL CASTINGS

The specifications required the plaintiff to furnish steel castings and they were furnished. The controversy over this item is as to payment for the same. The castings were to be embedded in the cement walls of the lock chamber. They

functioned to prevent injury to the walls by the vessels passing through, and to a limited extent prevented injury to the vessels themselves. Due to the number of castings to be furnished, it was impracticable to have their weight ascertained on the site of the work.

The specifications provided as follows:

> Unless otherwise authorized by the contracting officer, each casting shall be within 7½ per cent of the theoretical *weight as calculated from the drawings*. [Italics inserted.]

Obviously this provision has nothing to do with fixing payment for the castings except in an indirect way, as will appear. The provision deals expressly with the weight exacted for each casting. It is stated that the contractor was to be paid at the rate of 5½ cents a pound, after the total weight of all the castings was ascertained.

The plaintiff then, in order to ascertain weight, must resort, as the specifications direct, to the drawings which in this instance become part of the contract. No other method was available and none has been suggested in briefs or argument. Therefore, the solution of this issue depends upon the drawings for the weight of each casting; the specification is not involved.

We have said that all the castings were to be embedded in the walls of the lock chamber. In order to successfully accomplish this, the castings had to be fabricated with what are termed "core holes." The castings to be embedded had to be attached to wooden frames into which concrete was poured, and the "core holes," i. e., nothing more than ordinary holes, enabled workmen to attach them by inserting anchor pins into the holes and the wooden frames.

When the concrete set and the wooden frames were removed, the anchor pins, of course, were removed and the casting remained a solid portion of the walls of the lock chamber. There is nothing on the drawings previously referred to or in the computations of weight attached which shows in any way that in ascertaining the technical weight of the castings these core holes were to be excluded and the volume reduced to this extent.

The plaintiff diligently sought from the defendant its method of ascertaining the weight of the castings for payment purposes, and the defendant by a written offer advised the plaintiff that they would be paid for upon the basis of shipping weights at the point of manufacture as certified by the Government inspector, and payments were made upon this basis until some time in July. The defendant subsequent to this date for the first time resorted to a theoretical computation of weights and deducted the "core holes" and thereby reduced to the extent of the deduction the volume of the steel to be furnished. This had the effect of reducing the payments for the castings in the amount plaintiff now claims.

Theoretical weights are arrived at by computing the net volume of a casting and multiplying that net volume by a unit weight, depending upon the specific gravity of the material used (Finding 12). The defendant's officials followed this established formula except they reduced the net volume of the castings to the extent of the holes. It is said: "the core holes weighed nothing, but do take up room." The plaintiff's calculation made no allowance for the holes. It may be that it is good engineering practice to follow the defendant's course. However, we are to look to the contract and specifications; they govern in this instance.

It is contended that plaintiff's computation, irrespective of the core holes, is inaccurate because "not made with the degree of refinement" which characterizes the defendant's. The degree of refinement relied upon is predicated upon an alleged neglect of the plaintiff's engineer to take into consideration the contour of the castings and their precise area in ascertaining volume. The plaintiff's computation was made from the drawings which exhibited in detail the castings required. The plaintiff was required to furnish them in accord with the drawings, and it did so. The defendant's computation was not made until after the contract work had been completed, and an addendum was made as late as May 28, 1935, on which date the weight of the castings was reduced from 359.32 to 357.71 lbs.

We think the contractor observed the specifications and drawings, and although the difference between the parties

is comparatively insignificant, the belated change in the method of computation was obviously induced by the erroneous impression upon the part of the defendant that without the changed computation plaintiff was being paid a larger sum for furnishing the castings than the contract provided. As a matter of fact, the steel furnished by the contractor exceeded in actual weight much more in poundage than the plaintiff may be paid for under the technical computation. Judgment will be awarded for this item in the sum of $572.96.

MAINTAINING PUMPING PLANT

The plaintiff's contention involving the extra cost of maintaining the pumping plant is without merit. Finding 15 reflects the record accurately. Subsequent to directing the plaintiff to build a concrete apron at the lower end of the locks, the defendant allowed and paid the plaintiff $11,348.88 for this admittedly extra work. In building the apron the plaintiff had to provide two sub-cofferdams within the limits of its main cofferdam and the area was kept unwatered by pumps. What the plaintiff complains about is that this fact, coupled with the performance of the work involved in building the concrete apron, increased to the extent of $300 the cost of maintaining its main pumping plant. In other words, the decision to have the concrete apron built prolonged the period of time required to maintain its main pumping plant. The sum asked is conjectural and the record does not sustain a finding that any appreciable loss of time was caused thereby.

ANCHORING COFFERDAM

This item is to be decided upon facts. The main cofferdam to be constructed by the plaintiff in its upper arm had to be anchored or extended into the bank of the river. An adjacent landowner complained to both the plaintiff and defendant that the use of his land for the purpose of driving trucks over it and dumping materials thereon, or in other ways, was unauthorized. The defendant claimed the right to anchor the arm of the cofferdam and declined to

pay the landowner any sum. The plaintiff, however, entered into a contract with him and agreed to pay him $75, which was done. Obviously, the plaintiff has no claim for reimbursement. No obligation existed upon the part of the plaintiff to pay the sum.

EXCESS CEMENT

It is not denied that the plaintiff mixed and poured 23,935 batches of concrete in order to produce a sufficient amount to meet the requirements of the contract. If the batches as mixed had produced a perfect yield, 47,890 cubic yards of concrete would have been the result. The actual amount of concrete computed for the work was 47,626.7 cubic yards. The plaintiff consented to a deduction of 81 cubic yards and was paid for 47,545.7 cubic yards.

The claim under this item is predicated upon an alleged excessive use of cement, made necessary by defendant's order, over what would have actually been required to produce sufficient concrete to meet the requirements of the contract. In other words, it is asserted that the defendant exacted of plaintiff the use of a greater amount of cement to produce concrete than should have been exacted.

Findings 18 and 19 are supported by the record. The solution of the controversy depends upon the facts. The proportions of materials entering into the production of the concrete were amicably agreed upon. It was thought that the formula accepted would produce two cubic yards from each unit mixture. Theoretically a perfect result is not generally obtainable. Variations occur, in some instances decreasing, and in others increasing, the result. The general result obtained in this instance was satisfactory and the formulas prescribed for making the mixture indicate the usual degree of accuracy.

The plaintiff contends that it was demonstrated as a fact that the ratio of cement, sand, and gravel prescribed was not sufficient to produce two cubic yards per batch, and that because of this fact more cement was required, whereas additional sand and gravel should have been added as re-

quested instead of cement. The difficulty with this contention is that the first batch produced resulted in a mixture within about two percent of perfect, and that in the end the formula followed was approximately 99.5 perfect.

Paragraph 51 of the specifications provided as follows:

> 51. Proportioning. (a) Method.—All classes of concrete shall be proportioned by the water-cement ratio method.
>
> (b) Control.—The exact proportions of all materials entering into the concrete shall be determined by the contractor at frequent intervals as directed by the contracting officer. The contractor shall provide all equipment necessary to positively determine and control the relative amounts of the various materials. The proportions shall be changed whenever necessary to obtain the specified strength and workability, and the contractor shall not be compensated because of such changes.
>
> (c) Cement content.—Each cubic yard of concrete shall contain not less than 5 bags of cement.

The findings preclude a judgment for the amount asked.

CONSTRUCTION OF CRIBS AND MONOLITHS

The plaintiff contends that a proper construction of the plans and specifications concerned with payments for the construction and maintenance of a cofferdam entitle it to a judgment for $5,937.50. Contest over the correctness of the findings involving this item is not to any extent available. Findings 21 and 22 reflect the facts.

Paragraph 23 of the specifications discloses the fact that the cofferdam was to be paid for "on the basis of the number of linear feet of masonry in the lock and the lower guard wall." Assuredly this provision is clear. In addition, the specification states the number of linear feet involved, i. e., "935 linear feet." Precisely 935 linear feet of masonry made up the lock and lower guard walls, and the plaintiff was paid for the cofferdams accordingly. About this fact no dispute exists.

The upper guard wall of the lock was to be constructed without a cofferdam. This specification, like the foregoing one, is explicit. A cofferdam of the box type was essential,

and the defendant reserved the right to have it removed or to acquire same from the plaintiff and allow it to remain in place. The specifications cautioned the plaintiff to estimate the cost of building, maintaining, or removing the same in view of the above option of the defendant.

The plaintiff did not elect to construct the upper guard wall until after the cofferdam had been completed and in place. This resulted in compelling the plaintiff to construct within the cofferdam 47.5 feet of masonry in order to build a part of the upper guard wall. It is now claimed that this had the effect of increasing the linear feet of masonry within the limits of the cofferdam from 935 to 982.5 feet and increased by $5,937.50 the amount the plaintiff was paid under the specifications.

It is true the specifications notified the plaintiff that the amount bid for the construction and maintenance of the cofferdam "should be based on the assumption that the cofferdam will be removed," an unusual specification when considered along with the reservation upon the part of the defendant to acquire the same. Nevertheless this fact does not have the effect of negativing the positive one that the upper guard wall was to be constructed without a cofferdam.

The record discloses no compulsion upon the part of the defendant to restrain or require the plaintiff to pursue the course taken. Plaintiff was free to make a choice and was warned that to construct the upper guard wall within the cofferdam would not increase payments due under the contract and specifications. The plaintiff's engineer was a competent one. Work under contracts and specifications was not new to plaintiff, and it is difficult to perceive upon what basis in fact or law this item is claimed. It can not be allowed.

ERECTING NEW COFFERDAM

The loss claimed for the erection of a new cofferdam is as a matter of fact the outgrowth of the construction of the first cofferdam. It is not essential to discuss the claim in detail. What has already been said is sufficient. It is manifest from the record that the plaintiff should have anticipated the sit-

uation which finally culminated in the extra cost of constructing the upper guard wall. The contract and specifications granted the defendant a right not limited in any way except by the dates stated in the contract to acquire the old cofferdam.

Contract provisions are not susceptible to modification or change when they expressly state what may be done thereunder and the method and procedure for making changes. This principle of law is fundamental. The record does not sustain a contention that plaintiff could not possibly observe the provisions of the specifications, and if a choice obtained to do the work in one way or another the contractor may not recover because the most expensive way was adopted. We do not allow recovery.

COST OF EMBEDDED TIMBERS

Paragraph 61 of the specifications provided the basis of measurement for payment for concrete. A portion of this paragraph is as follows:

> In measuring concrete for payment no deductions will be made for rounded or beveled edges or spaces occupied by metal work, or for voids less than 5 cubic feet in volume or less than 1 square foot in cross section. The price bid for concrete shall include all materials, forms, tie-rods, expansion joints, cement testing, and all incidental work.

The record is clear that in the construction of the upper guard wall of the lock crib timbers used in the construction of the same were embedded in concrete. It is also not to be denied that what was done came squarely within the specification quoted above. The defendant refused to include the area occupied by the embedded materials, an area of 98.08 cubic yards, in measuring the concrete for payment on the ground that timber rather than metal was involved. This construction of the specifications is unwarranted. The void was less than 5 cubic feet in volume and as such was to be included in concrete measurement. The plaintiff in constructing the upper guard wall was compelled by the specifications to resort to crib timber in so doing and the crib timbers extended

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into the concrete and were encased therein. The Chief of Engineers recommended payment of this item and we think it is recoverable. The sum of $784.64 will be included in the judgment of the court.

COST OF CRIB TIMBERS

Finding 26 states the facts. In the computation of the amount of board feet required to construct the crib timber used in the construction of the upper guard wall the difference between the parties is so insignificant that proof as to error upon the part of the defendant has not been adduced. The amount claimed, $44.10, will not be allowed.

GROUTING AND PREPARING ROCK SURFACES

The parties to this suit disclose a wide difference of conviction as to the facts relevant to the plaintiff's claim under this item. The contract work involved has to do with the preliminary preparations for the construction of the foundations of the lock. A portion of paragraph 24 of the specifications reads as follows:

> All rock surfaces for foundations must be freed from loose pieces and worked down to a firm, solid bed of suitable form satisfactory to the contracting officer.

The defendant decided soon after the plaintiff began work to have the plaintiff perform additional work not provided for in the specifications, i. e., the grouting of the foundations under the lock wall. A proper order was issued for this additional work; plaintiff accepted it, and, when concluded, was paid $15,577.79 for performing the same.

Grouting the foundations, as it is called, consisted of drilling holes into the rock foundations and forcing into the same liquid concrete. This was done "to solidify the foundation rock on which the walls were to rest and also to reduce the amount of seepage under and through the foundations." When this was completed the rock surfaces under which the grouting work was done were to be prepared to receive concrete.

Paragraph 53 of the specifications is in part as follows:

> (b) Placing.—Concrete shall be placed as soon as practicable after oiling the forms and before initial set has occurred, and in no event after it has contained its water content for more than thirty (30) minutes. Unless otherwise specified, all concrete shall be placed in the dry upon clean, damp surfaces, free from running water, and never upon soft mud, dry porous earth or frozen earth, or upon fills that have not been subjected to approved puddling or tamping so that ultimate settlement has occurred. * * *

The plaintiff encountered difficulty both in the preparation of the rock surfaces to receive concrete and in placing concrete. Water came into the foundation area in such quantities as to impose upon the plaintiff cost and expense it had not contemplated in the performance of the work. Plaintiff experienced much trouble and incurred added expense in making the rock surface sufficiently dry to receive the concrete.

Plaintiff seeks a judgment for the sum of $5,800, insisting first: that the flow of water encountered was occasioned by misleading representations made by the defendant's official as to subsurface conditions, it being contended that the defendant's drawing available to plaintiff "indicated sound solid limestone above the points where the monoliths were to rest," whereas as a matter of fact the subaqueous rock found was laminated and water-bearing and was in fact the source of the unusual quantity of water encountered.

Plaintiff's second contention upon this item is that because of the absence of any warning as to exact subsurface conditions—a fact, it is said, the defendant knew—plaintiff was obliged to do a large amount of extra drilling and grouting for which no payment has been made, and further, as a consequence of the misleading drawings, plaintiff was required to perform a large amount of extra and expensive work in preparing the rock surfaces for the receipt of concrete.

A misrepresentation of the character of the one relied upon by plaintiff must be one that actually misleads the party aggrieved, and in this instance the record does not warrant a holding to that effect. *Christie* v. *United States*, 237 U. S. 234; *Hollerbach* v. *United States*, 233 U. S. 165.

The specifications contained these two pertinent and important paragraphs:

> From surveys and borings made at the site it is assumed that conditions will be found approximately as indicated on the drawings, but bidders are advised to make their own investigations and estimates and to prepare their bids accordingly.
> Samples of core borings at the lock site are on hand at U. S. Engineer Field Office, Lock No. 5, Kanawha River, Marmet, W. Va., where they may be seen by prospective bidders. Bidders are advised to examine the cores and to judge for themselves the character of materials to be encountered.

It is admitted that the plaintiff did not make any investigation of its own. It is also conceded that plaintiff examined the surveys but did not examine samples of borings made by the defendant, and while the drawings did not disclose "a seamy, laminated, or broken condition," the borings did. We have no record showing that the drawings were false so far as they went. There is no proof of record that any official of defendant registered a condition, as disclosed by a boring, that was false. In order to sustain misrepresentation it must be proven that the defendant's official made a boring and found a certain condition and did not register exactly what was found, but, on the contrary, registered a different condition from what the boring showed.

The plaintiff from the record was at fault. Subsurface conditions foreseeable only from tests, borings, and surveys, were designated by the specifications, so far as the defendant explored the situation, as precarious. The defendant did not warrant their accuracy, and in the absence of positive and convincing proof of misrepresentation we can not imply its existence. As a matter of proven fact, it is evident that more than one source existed from which water and seepage came. The item will not be included in the judgment.

Judgment will be awarded the plaintiff for the total sum of $1,570.62. It is so ordered.

WHALEY, *Judge*; LITTLETON, *Judge*; and GREEN, *Judge*, concur.

WILLIAMS, *Judge*, took no part in the decision of this case.

JAMES V. MARTIN v. THE UNITED STATES

[No. 42873. Decided January 9, 1939]

On Motion for Bill of Particulars

Patent cases procedure; bill of particulars; admission.—Where motion for bill of particulars seeks an admission on the part of the defendant rather than an amplification of defendant's pleadings, it is not allowable.

Same; ownership.—Whether the plaintiff has or has not made any agreement, assignment, or exclusive license of the patent in suit to any person, firm, or corporation is a matter that comes definitely within his own knowledge; ownership is one of the items of proof involved in the presentation of plaintiff's case.

Same; evidence.—It is not the function of a bill of particulars to require a party to disclose evidence or names of witnesses.

Same; employment.—Information as to employment of plaintiff at a particular time is within the knowledge of plaintiff, and not properly included in a motion for a bill of particulars.

Same.—Dates of conception and reduction to practice are matters solely within knowledge of plaintiff.

Same; suggestion as to procedure.—The Court suggests that time and expense would be saved if plaintiff would give notice to the defendant, either in response to a motion for a bill of particulars, or in some other form binding upon the plaintiff, setting forth the dates of conception and reduction to practice it intends to rely upon, and the application of the claims in issue as applied to the alleged infringing structures.

Same; dates of conception and reduction to practice.—Before a defendant can be called upon to furnish a bill of particulars the essential facts relied upon by the plaintiff to establish his cause of action must be pleaded; in the instant case it is held that the plaintiff is in error in seeking a bill of particulars asking the defendant to divulge the prior art relied upon in order to facilitate disposition of the case, without setting forth in plaintiff's petition the dates of conception and reduction to practice.

Plaintiff's motion for Bill of Particulars was overruled, the Court stating:

This is a patent case in which plaintiff, in accordance with Court of Claims Rule 38 (b), has filed a motion for Bill of Particulars on November 29, 1938, and to which defendant has filed objections.

Paragraphs 1 and 2 are as follows:

> 1. Does the Government admit that plaintiff, James V. Martin, is the owner of the patent in suit and the claim involved in this petition?
>
> 2. If the answer to 1 is negative state facts including names, dates, and places the Government will attempt to prove in this respect.

The language or form of paragraph 1 is not allowable, in that it seeks an admission on the part of defendant rather than an amplification of defendant's pleadings. In order, however, to save time and arrive at the real issues involved in connection with the present motion we shall consider paragraph 1 as if it were phrased as follows:

> Will the Government contend that the plaintiff, James V. Martin, is not the owner of the patent in suit and the claim involved in this petition?

Whether the plaintiff has or has not made any agreement, assignment, or exclusive license of the patent in suit to any person, firm, or corporation, is a matter that comes definitely within his own knowledge. Ownership is one of the items of proof involved in the presentation of plaintiff's prima facie case, and the facts surrounding such proof are of such a nature as to be peculiarly within plaintiff's own knowledge.

The question of *res adjudicata* is not involved herein as in the case of *Hazen C. Pratt* v. *The United States* (87 C. Cls. 586), to which plaintiff has referred in his motion.

Paragraph 1 is therefore overruled.

Paragraph 2, which is dependent upon paragraph 1, is likewise overruled, it being further added that this paragraph is defective in that it calls upon the defendant for evidential facts including names. It is not the function of a bill of particulars to require a party to disclose evidence or names of witnesses.

Paragraphs 3 and 4 read as follows:

> 3. Does the Government admit that the plaintiff, James V. Martin, has not in any way voluntarily aided, abetted, or given encouragement in rebellion against the Government of the United States?
>
> 4. If the answer to 3 is negative, state facts including names, dates, and places the Government will attempt to prove in this respect.

The language of paragraph 3 is defective for the same reason set forth in connection with paragraph 1, but, entirely aside from objection to form, the information herein sought is immaterial and unnecessary as we understand that defendant has not specifically traversed the question of allegiance. (See Court of Claims Rule 8 (f).)

> 8 (f) * * * Proof of true allegiance by the plaintiff will not be required unless the allegation is by plea or otherwise specifically traversed by the defendant.

Paragraphs 3 and 4 are therefore overruled.

Paragraphs 5 and 6 are as follows:

> 5. Does the Government admit that the plaintiff when he makes such claim is not in the employment or service of the Government of the United States?
>
> 6. If the answer to 5 is negative, state facts including names, dates, and places the Government will attempt to prove in this respect.

We shall consider paragraph 5 as if it read as follows:

> Will the Government contend that the plaintiff, at the time of filing the petition in this case, was in the employment or service of the Government of the United States?

The information herein requested would appear to be within the knowledge of plaintiff. At the time of filing the petition (December 26, 1934) plaintiff knew the facts relating to where and by whom he was employed.

The motion for the bill of particulars is in no way indicative of how an amplification of defendant's pleadings in this respect would either prevent surprise or expedite the proceedings.

Paragraphs 5 and 6 are overruled.

Paragraph 7 is as follows:

> 7. Does the Government admit that the subject-matter of the patent in suit was not discovered or invented during any time of plaintiff's employment or service of the Government of the United States?

This question, as is the case of the others of similar form which we have discussed above, is objectionable as to its form calling for admissions. If rewritten in proper form it would be objectionable.

Plaintiff has stated to the Court in his objections to the motion for bill of particulars on the part of the defendant, which objections were filed February 5, 1935, that "all Government planes infringe all claims of the patent." There is a total of twenty-one claims contained in the patent in suit which are directed to numerous and varied inventions or combinations of elements which may have been conceived and reduced to practice at various times.

The dates of conception and reduction to practice are matters solely within the knowledge of the plaintiff, and defendant may not be in a position to state that the plaintiff was in the employment of the Government when the inventions were conceived and reduced to practice.

Paragraph 7 and the depending paragraph 8 are overruled.

Paragraphs 9 to 13, inclusive, are directed in substance to an ascertainment of what defenses the Government will rely upon with respect to the validity of the patent, and a specific request is made in paragraph 11 for a notice relative to prior patents, publications, prior use, or prior invention.

Rule 38 (a) of the Court of Claims is directed to notice of these matters and provides that this notice be given thirty days before defendant offers its evidence. This rule is as follows:

> 38 (a) In any patent suit, plaintiff shall in the petition particularly specify the claim or claims of the patent or patents alleged to be infringed and the defendant shall give the plaintiff or his attorney 30 days' notice in writing, as provided by section 69, title 35, United States Code, before offering evidence to prove any of the special matters of defense specified therein.

It is apparent that a plaintiff's prima facie case might be expedited and shortened, certain claims withdrawn from the issue, and the case even dismissed on motion of plaintiff, if notice of the defenses were furnished to plaintiff prior to its presentation of testimony.

On the other hand it is equally apparent that in certain instances where the alleged infringing structures are complicated or involve a plurality of various types, the defendant

Motion for Bill of Particulars

can not plan and consolidate its defense until plaintiff's application of the claims in issue to the infringing structures are known, and even then defendant's search of the prior art and uses is at a disadvantage, for the dates of conception and reduction to practice of the invention or inventions in issue are not known and can not be used to limit this field of search.

It has been a recognized procedure in some of the Federal Courts to allow statements to be simultaneously filed by both plaintiff and defendant, in which the plaintiff sets forth under oath the dates of invention, and the defendant lists the prior art defenses. See *Beacon Folding Mach. Co.* v. *Rotary Mach. Co. et al.* 23 Fed. (2d) 345.

Such procedure while helpful does not in our opinion fully meet the situation, as the field of investigation and search by defendant is not limited. One example of this is when a plaintiff relies only upon the filing date of his application, but defendant, unaware of this in the preparation of its defenses, has had to search the prior art for an extensive period of years prior to the filing date.

While this matter has never been formally presented to this Court with arguments pro and con, we think considerable time and expense would ultimately be saved if the plaintiff would give notice to the defendant, either in response to motion for a bill of particulars or in some other form binding upon the plaintiff, setting forth the dates of conception and reduction to practice it intends to rely upon, and the application of the claims in issue as applied to the alleged infringing structures.

If this were done we see no reason why the defendant with this information at hand could not then expedite its search and consolidate its defenses, and furnish plaintiff, prior to its prima facie testimony, with a bill of particulars setting out in detail the prior art defenses to be relied upon.

From what we have said it is apparent that in the present instance defendant would be placed at a disadvantage if it were now required to furnish plaintiff with a list of its defenses. For this reason paragraphs 9 to 13, inclusive, are overruled.

It is stated as a matter of law that a bill of particulars in practice is "a detailed informal statement of a plaintiff's cause of action, or of the defendant's setoff, furnished by one party to the other in compliance with a statute, rule or special order of court." Therefore, it is apparent that before a defendant can be called upon to furnish a bill of particulars the essential facts relied upon by the plaintiff to establish his cause of action must be pleaded, and where the plaintiff in this instance has fallen into error is if he seeks a bill of particulars asking the defendant at this time to divulge the prior art relied upon in order to facilitate disposition of the case, he should in his petition set forth the dates of conception and reduction to practice. This manifestly tends to minimize the length of the record in this respect. As noted in this memorandum, we attempt to set forth a suggestion as to how this might be accomplished.

The motion for the bill of particulars is overruled.

J. W. RUMSEY, AN INDIVIDUAL TRADING AS RUMSEY AND COMPANY, v. THE UNITED STATES

[No. 43174. Decided January 9, 1939]

On the Proofs

Government contract; authority of General Accounting Office.—It is held that under the facts of the case the contract itself determined the rights of the parties and the General Accounting Office was without jurisdiction. *McShain Co.* v. *United States*, 83 C. Cls. 405 and authorities therein cited.

The Reporter's statement of the case:

Mr. John W. Cross for the plaintiff. *Messrs. Wm. I. Denning* and *Clark Nichols, Jr.*, were on the brief.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows, upon stipulation:

SPECIAL FINDINGS OF FACT

1. On and prior to November 23, 1932, J. W. Rumsey, plaintiff herein, was and ever since that date has been and now is a citizen of the United States and a resident of the State of Washington. He has at all such times been engaged in construction work trading under the name of Rumsey and Company.

2. In pursuance of and under the authority contained in the Act of Congress known as the "Emergency Relief and Construction Act of 1932," approved July 21, 1932, 47 Stat. 709, 725, the defendant, represented by R. M. Warfield, Commander (CEC), U. S. Navy, Public Works Officer, Thirteenth Naval District, thereunto duly authorized, issued invitation for bids for the construction of a drainage culvert between Dry Dock No. 1 and the pump well of Dry Dock No. 2 at Puget Sound Navy Yard, Bremerton, Washington. By the terms of the invitation the bids were to be submitted for the entire work complete in accordance with drawings and specifications which were made available to the plaintiff and other bidders. A true copy of the specifications is set forth as Exhibit A to the petition, and is made a part of this finding by reference.

3. In response to the invitation the plaintiff submitted its bid in the sum of $44,255. This was the lowest bid received and was accepted by the defendant. Pursuant thereto a written contract on the standard Government form of contract was executed by and between the defendant and the plaintiff on November 23, 1932. A true copy of the contract is set forth as Exhibit B to the petition and is made a part of this finding by reference.

Attached to the contract and made a part thereof were general provisions relative to the same. A true copy of the general provisions is set forth as Exhibit C to the petition and is made a part hereof by reference.

4. Paragraph 2–02 of the specifications relative to subsurface conditions states as follows:

> 2–02. *Test Borings*.—Records of test borings made by the Government accompany this specification and will form a part of the contract. Bids shall be based on the following assumptions: (a) that subsurface conditions are as indicated; (b) that rock will not be encountered; and (c) that no pipes or other artificial obstruction, except those indicated, will be encountered. In case the actual conditions differ from those stated and/or shown, an adjustment in the contract price and/or the time for completion of the work will be made in the same manner as provided by article 4 of the contract. * * *

The records of the test borings referred to in the foregoing paragraph are shown on the drawing No. 9845, which was attached to the specifications and made a part of the contract. A true copy of the drawing is attached as Exhibit 1 to the stipulation and made a part of this finding by reference. The drawing shows the location and records of twelve test borings located within the space shown where the cofferdam was to be sunk and where the culvert proper was to be constructed. Test Hole No. 1 is the only test hole shown on the drawing located within the area provided for the cofferdam. The other eleven test holes are located within the area provided for the culvert proper. Test Hole No. 2 is located approximately 5 feet from the edge of the cofferdam. No quicksand was indicated in the contract drawing or test boring records at the site of the cofferdam.

5. Drawing No. 9628, which was made a part of the contract, shows plans for the construction of an open cofferdam. The drawing is attached to the stipulation as Exhibit 2 and made a part of this finding by reference.

6. Drawing No. 9627, which was made a part of the contract, is attached to the stipulation as Exhibit 3 and made a part of this finding by reference. Drawing 9627, Section B–B, drawing No. 9628, Section C–C, and drawing No. 9845, Section A–A, show the lower portion of the pump well wall to be 9 feet 6 inches thick by scale. The aforementioned Yard Drawing No. 9627 showed no brick cover. Actually the wall was 10 feet thick with 9 inches of brick cover.

Drawing No. 9628 indicates the thickness of the pump well wall correctly by scale. However, the distance shown from the pump well wall to the side of the intake scales 1 foot too great and indicates a contemplated clearance between the cofferdam and the wall of 2 feet. The actual clearance was only 9 inches as shown by exhibits referred to in Finding 12 hereof. The error in drawings was discovered during construction as hereinafter described.

7. Paragraph 1–03 of the specifications contains the following statement relative to the location of the work:

> 1–03. *Location.*—The work shall be located at the Puget Sound Navy Yard, Bremerton, Washington, approximately as shown on the drawing. The exact location will be indicated by the officer-in-charge.

Paragraph 1–11 of the specifications contains the following relative to the removal of obstructions which would interfere with building operations:

> 1–11. *Government work and materials.*—The Government will remove all existing known obstructions such as railroad tracks, service lines, paving, etc., in the vicinity of Dry Dock No. 2 pump well which may interfere with construction of the cofferdam at that point.

The actual final location of the cofferdam was not exactly as shown by dimensions on the contract drawings, but approximately one foot to the westward of the site so shown. Drawing No. 9845, Section A–A, shows approximate location of the east wall of the cofferdam with respect to the standard gauge track in the vicinity of Dry Dock No. 2 pump well. The interference of the cofferdam, as shown on this drawing, with the standard gauge railroad track is as hereinafter stated in Findings 13 and 14 and is described in the exhibits referred to therein.

The characteristics of certain of the ground materials encountered by the contractor at the site of the cofferdam differed from the material described in the contract, and completion of that part of the work under safe conditions necessitated the adoption of the closed cofferdam method and compressed air in lieu of the open type of cofferdam contemplated by the contract.

8. Within the time specified by the contract, plaintiff completed construction of the culvert and cofferdam. However, quicksand was encountered in the construction of the cofferdam during the time plaintiff was attempting to use an open cofferdam.

9. When the plaintiff attempted to drive sheet pilings for the cofferdam, some of it encountered the pump well wall (erroneously shown on drawings—see Finding 6) which was located above the depth to which sheet pilings were to have been driven. It was then discovered that contract drawings were in error.

10. On January 7, 1933, the contractor requested permission to install a wooden diaphragm at elevation 91.66 with backfill earth loaded thereon in order to complete the remaining work in a closed cofferdam under compressed air. Prior to proceeding with closed cofferdam construction, plans and drawings for closed cofferdam, showing construction under air pressure, were prepared by the defendant and were approved and signed by Commander R. M. Warfield (CEC), U. S. N., Public Works Officer. The construction features shown on such plans and drawings, including closed cofferdam and construction under air pressure, are contained in drawing No. 10227, approved and signed by Commander R. M. Warfield (CEC), U. S. N., Public Works Officer, on May 17, 1933. A true copy of this drawing is attached to the stipulation as Exhibit 4 and is made a part hereof by reference.

Plaintiff thereafter continued construction with a closed cofferdam under air pressure. The construction of the closed cofferdam and the use of compressed air was estimated to be more expensive than the construction of an open cofferdam would have been, and on March 28, 1933, plaintiff presented his claim for additional compensation to Commander R. M. Warfield (CEC), U. S. N., Public Works Officer.

The claim was transmitted to the Bureau of Yards and Docks and was forwarded by the Assistant Chief of this Bureau to the Secretary of the Navy (Judge Advocate General). Thereafter the defendant appointed a Board of Changes, to which Board plaintiff's claim was referred.

Reporter's Statement of the Case

11. With respect to type of cofferdam construction contemplated, in a letter dated June 24, 1933, Commander R. M. Warfield (CEC), U. S. N., Public Works Officer, the officer in charge who prepared the drawings and specifications states as follows:

> *Par. 1* (*a*) *of reference* (*a*)—
>
> * * * * *
>
> It was anticipated that with a steel pile cofferdam no difficulty would be experienced in constructing the intake under open conditions.

A true copy of this letter is attached to the petition as Exhibit D and is made a part of this finding by reference.

A letter dated January 19, 1934, from the Board of Changes to the Commandant states:

> The estimated cost of sinking the intake excavation as originally intended by the contract drawings and specifications is then: * * * $17,278.08.

A true copy of this letter is attached to the petition as Exhibit G and is made a part of this finding by reference.

12. The error in the drawings referred to in finding 6, *supra*, resulted in showing 15 inches more clearance between the pump well and the cofferdam than in fact existed. This error is commented upon in the following letters and communications: letter of June 24, 1933, from Commander R. M. Warfield (CEC), U. S. N., Public Works Officer, to Chief of the Bureau of Yards and Docks; letter of December 5, 1933, from George A. McKay, Assistant to Chief of the Bureau of Yard and Docks, to Secretary of the Navy (Judge Advocate General), which is set forth as Exhibit E to the petition and is made a part of this finding by reference; and letter of December 18, 1933, from H. L. Roosevelt, Acting Secretary of the Navy, to Chief of the Bureau of Yards and Docks, a true copy of which is attached as Exhibit 5 to the stipulation and made a part hereof by reference.

13. The interference of the standard gauge railroad track with the location of the cofferdam, referred to in Finding 7, *supra*, and the construction of the trackage at this point, is described in detail in the letter of June 12, 1933, from the

plaintiff to Chief of the Bureau of Yards and Docks, United States Navy Department, Washington, D. C., copy of which is attached to the stipulation as Exhibit 6 and is made a part hereof by reference.

14. The manner of locating the cofferdam is described in the letter of December 5, 1933, from George A. McKay, Assistant to Chief of the Bureau of Yards and Docks, to Secretary of the Navy, which states as follows:

> As will be seen from reference (o), which is a reply to questions asked in reference (m), the exact location of the cofferdam was not indicated by the officer-in-charge, but it appears that the question of the location of the cofferdam was raised and a discussion took place between the contractor and the officer-in-charge as to its exact location. After this discussion the actual final location was proposed by the contractor and, though not formally, at least tacitly, agreed to by the officer-in-charge, and the work proceeded with his approval. It is not entirely clear to the Bureau why the cofferdam was constructed on the exact site finally selected. It appears that this site was selected to obviate the moving of a certain adjacent railroad track that by the contract provision would otherwise have had to be moved by the Government. The actual final location of the cofferdam was not exactly as shown by dimensions on the contract drawings, but rather one foot to the westward of the site so shown.

Commander R. M. Warfield (CEC), U. S. N., Public Works Officer, the officer in charge, in his letter of June 24, 1933, to the Chief of the Bureau of Yards and Docks, states as follows:

> *Par. 1 (b) of reference (a)*—
>
> The Yard did not locate the shaft cofferdam. In fact, the contractor was advised that the responsibility was his. Before submitting his drawing, Yard No. 10099, drawing of modified cofferdam, the matters of size and location were discussed. The contractor wanted to reduce the size to save excavation, and it is believed the cofferdam was moved one foot West primarily to save the railroad track, although the contractor was given to understand that it was entirely up to him whether he should move it or not, as the Public Works Office had laid out a plan for moving the railroad track to clear the cofferdam and maintain connection with Pier 5.

Reporter's Statement of the Case

The following are excerpts from the letter of December 18, 1933, from Secretary of the Navy to Chief of the Bureau of Yards and Docks:

> 7. While the officer-in-charge of the work contends that the site finally selected was not approved in any manner as the cofferdam was considered temporary work for which the contractor was responsible, it nevertheless appears from the record that the question as to the final location of the site was discussed by the contractor with said officer and the actual final location proposed by the former was at least tacitly agreed to by the latter and the work proceeded with his approval.
>
> * * * * *
>
> 9. In view of the above provisions, of the fact that the final location of the site for the cofferdam appears to have been selected primarily for the benefit of the Government, in that the changed location eliminated the necessity of removing the railroad tracks, which work would have had to have been performed at the Government's expense with the attendant delay and interference with traffic to Pier No. 5 as well as interference with traffic between dry docks Nos. 1 and 2, and of the further fact that the site thus selected was apparently agreed to by the officer-in-charge of the work, it is considered that the Government can not under the existing circumstances impose liability for the location of the cofferdam on the contractor but must itself accept such responsibility.

15. With respect to the subsurface conditions encountered and the type of cofferdam construction, the officer in charge states in his letter of June 24, 1933, that—

> *Par. 1 (a) of reference (a)*—
>
> The ground materials encountered by the contractor throughout the entire project have been practically as shown by the test borings, and as shown and described in the plans and specifications. The behavior of the material on the site of the cofferdam, however, was materially different from what had been anticipated. The Present Public Works Officer was on duty at this Navy Yard when the pump well was originally built, and the walls of the excavation stood nearly vertical, and no great trouble was experienced with water, it being readily handled with a pump.
>
> * * * * *

> Actually, the ground was lacking in cohesion, which, combined with the water, made it fluid, and when, on 7 January, the contractor requested permission to install a wood diaphragm at elevation 91.66 with backfill earth loaded thereon in order to complete the remaining work under compressed air, this was authorized as it was necessary in order to proceed safely with the work.
>
> * * * * *
>
> 2. It is believed that the contractor is entitled to additional compensation due to change in method of constructing the intake from the open cofferdam, as called for in drawings and specifications, to the compressed air method made necessary by the ground conditions being materially different from those contemplated. * * *

16. In the letter of December 18, 1933, The Acting Secretary of the Navy advised the Bureau of Yards and Docks as follows:

> 21. Summarizing the above, the Navy Department is of the opinion that the contractor has a valid claim for the change in location of the site of the cofferdam and for the error in the Government's drawings, above mentioned. The contractor, furthermore, has a valid claim for the differences encountered in underground conditions if such conditions, in fact, differed from those indicated by the Government.

As aforementioned, the defendant appointed a Board of Changes consisting of two representatives of the Navy Department and one representative of the plaintiff and by letter dated January 9, 1934, from H. E. Campbell, Commandant, to Commander R. M. Warfield (CEC), U. S. Navy, Public Works Officer, a true copy of which is set forth as Exhibit F to the petition, and is made a part of this finding by reference, requested the Board to—

> investigate the claim submitted by the contractor, J. W. Rumsey and Company, and report the estimate and finding as to the additional expense, if any, to which the contractor was necessarily put in the performance of Contract NOy–1651 through the following causes for which the Government is held responsible.
>
> (a) The relocation of the cofferdam too near the pump house well.

(b) An error in the Government's drawing resulting in the striking of an artificial obstruction in the driving of sheet piling.

(c) Underground conditions differing from those contemplated by the contract.

17. The Board of Changes reported in letter of January 19, 1934 (Exhibit G of petition and made a part of this finding by reference), signed by R. M. Warfield, Member, Commander (CEC), U. S. N.; J. W. Rumsey, Member; H. S. Bear, Member and Recorder, to the Commandant, that plaintiff was entitled to the sum of $13,493.36 as the additional compensation due on account of the increased cost of cofferdam construction over and above the amount of $17,278.08, the estimated cost of sinking the intake excavation as originally intended by the contract drawings and specifications. A voucher in plaintiff's favor for this amount was duly issued by the Chief of the Bureau of Yards and Docks and transmitted to the General Accounting Office for settlement. The Comptroller General of the United States refused payment of this voucher though demand has repeatedly been made therefor.

The court decided that the plaintiff was entitled to recover.

MEMORANDUM

Under the provisions of the contract involved, the plaintiff's claim was considered by a Board of Changes made up of two representatives of the Navy Department and one representative of the plaintiff. This Board on January 19, 1934, found that the plaintiff was entitled to $13,493.36 extra compensation due to the increased cost of cofferdam construction and the "cost of sinking the intake excavation" over and above the originally estimated cost. The site of the work was changed and this change in location brought about the conditions which resulted in extra cost to the plaintiff. Every official of the Navy Department charged with considering and recommending with respect to the claim approved it, and after allowance by the Board a voucher in plaintiff's favor was issued by the Bureau of Yards and Docks. The General Accounting Office later refused pay-

ment of the same and denied the claim. The General Accounting Office was without jurisdiction to consider it. The contract itself under the facts of this case determined the rights of the parties. *McShain Co.* v. *United States*, 83 C. Cls. 405, and authorities therein cited. The plaintiff is clearly entitled to the judgment awarded.

JAMES A. GREENWALD, JR., v. THE UNITED STATES

[No. 43588. Decided January 9, 1939]

On the Proofs

Navy Pay; officer retired under provisions of U. S. Code, Title 34, Section 417; effective date of retirement.—Where an officer in the Navy was retired under the provisions of U. S. Code, Title 34, Section 417 (R. S. 1453) the effective date of retirement is the date contained in the recommendation of the Secretary of the Navy which the President approved, and not the date upon which the President affixed his signature.

Same.—The President has the power to fix the date of retirement, under the Statutes.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *Mr. Fred W. Shields* and *King & King* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. On June 3, 1926, plaintiff was appointed an ensign in the United States Navy. He was promoted to lieutenant, junior grade, on June 3, 1929, and served continuously on active duty until July 1, 1936.

2. On April 2, 1936, pursuant to orders of the Secretary of the Navy, plaintiff appeared before a naval retiring board which found that he was incapacitated for active service by reason of psychoneurosis, neurasthenia, and that his incapacity was permanent and was the result of an incident of the service.

3. On May 26, 1936, the Secretary of the Navy forwarded the findings of the retiring board to the President with recommendation that they be approved and that on July 1, 1936, plaintiff be retired from active service and placed on the retired list in conformity with the provisions of the United States Code, Title 34, Section 417.

4. On May 27, 1936, the President approved the findings of the retiring board and the recommendation of the Secretary of the Navy.

5. On June 6, 1936, the Chief of the Bureau of Navigation advised plaintiff as follows:

> 1. The Naval Retiring Board before which you appeared found you incapacitated for active service by reason of psychoneurosis, neurasthenia; that your incapacity is permanent, and is incident to the service.
>
> 2. The President of the United States, under date of 27 May, 1936, approved the proceedings and findings of the Naval Retiring Board in your case, and on 1 July, 1936, you will, in accordance with his direction, regard yourself as having been transferred to the retired list of officers of the Navy from that date, in conformity with the provisions of U. S. Code, Title 34, Section 417.
>
> 3. Acknowledgment of receipt is requested.

6. On June 2, 1936, plaintiff completed 10 years of service for pay purposes.

7. If it is held that plaintiff was transferred to the retired list on July 1, 1936, he is entitled to the difference between the active duty pay and allowances of a lieutenant, junior grade, credited with more than 10 years' service, and that of a lieutenant, junior grade, with more than 9 and less than 10 years' service from June 1, 1936, to June 30, 1936, and to the difference between the retired pay of a lieutenant, junior grade, with more than 10 years' service for pay purposes and that of a lieutenant, junior grade, with more than 9 and less than 10 years' service from July 1, 1936, to the date of judgment. The claim is a continuing one.

The court decided that the plaintiff was entitled to recover.

Entry of judgment was suspended to await the coming in of a report from the General Accounting Office * showing the amount due plaintiff in accordance with this opinion.

* See page 622, *post*.

Opinion of the Court

WHALEY, *Judge*, delivered the opinion of the court.

On June 3, 1926, the plaintiff was appointed an ensign in the United States Navy. He was promoted to Lieutenant, Junior Grade, on June 3, 1929. He served continuously on active duty until July 1, 1936. On April 2, 1936, the Naval Retiring Board found that plaintiff was permanently incapacitated for active service by reason of pyschoneurosis, neurasthenia, due to an incident of the service. On May 26, 1936, the Secretary of the Navy submitted the findings of the Board to the President with the recommendation that they be approved "effective July 1, 1936, and that Lieutenant (J. G.) James A. Greenwald, Jr., U. S. Navy, on said date be retired from active service and placed on the retired list in conformity with the provisions of U. S. Code, Title 34, section 417." The findings of the Retiring Board and the recommendation of the Secretary of the Navy were approved by the President on May 27, 1936. On June 6, 1936, the plaintiff was advised of the findings of the Retiring Board by the Bureau of Navigation; that the President had approved the findings; and that on July 1, 1936, in accordance with the direction of the President, he should regard himself as having been transferred to the retired list.

The sole question in this case is whether the plaintiff was retired July 1, 1936, the date contained in the recommendation of the Secretary of the Navy which the President approved, or May 27, 1936, the date upon which the President affixed his signature to the approval of the decision of the Retiring Board.

Section 1453 of the Revised Statutes reads as follows:

> When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the President, be retired from active service with retired pay.

The defendant contends that, under this section of the statute, retirement took place immediately upon the approval by the President of the recommendation of the Retiring Board and not upon the date fixed in the recommendation of the Secretary of the Navy as approved by the President. In other words, that the Board had no power to

recommend and the President had no power to fix a future date for retirement, and that, where an officer was found to be permanently incapacitated as the result of an incident of the service, he was automatically retired when the President approved the recommendation.

Section 1452 of the Revised Statutes reads as follows:

> A record of the proceedings and decision of the board in each case shall be transmitted to the Secretary of the Navy, and shall be laid by him before the President for his approval or disapproval, or *orders in the case.* [Italics ours.]

Section 1448 of the Revised Statutes gives the President discretion, when, in his judgment, an officer is incapacitated to perform the duties of his office, to refer the case to the Retiring Board.

We can find nothing in these sections of the Statutes to prohibit the President, upon the recommendation of the Retiring Board, from fixing the date of retirement after the date on which he signs the recommendation of the Board. The whole intent and meaning of these sections is to place the decision with the Retiring Board as to the physical incapacity of the officer and on what date he should be retired. Section 1452 of the Revised Statutes allows the President to approve, or disapprove, or issue orders in the case when the decision of the Board is transmitted to him by the Secretary of the Navy. The act does not give to an officer the right of retirement but places within the discretion of the President whether or not an officer should be retired for permanent incapacity and when he should be retired. In *Holland* v. *United States*, 83 C. Cls. 376, this court held:

> Retirement constitutes a change of status and is, by reason of the mandatory provisions of section 1453 of the Revised Statutes, effective on the date the action is taken by the President, unless some other date is fixed in the order.

This case is clearly distinguishable from the case of *Terry* v. *United States*, 81 C. Cls. 958. In that case the plaintiff was retired because of the age limit fixed in the statute which was the date of retirement as fixed by the President,

but he claimed active duty compensation to the time he arrived at his home station because he was under travel orders to his home station. The court held that, where the statute fixed the age limit and the President retired him on that day, all other orders were superseded and he automatically was retired on the day fixed by the President.

In the instant case we hold that the plaintiff was retired on the day on which the President decided the order should go into effect. We can not take into consideration the fact that, by placing him on the retired list at a future date, it will allow the plaintiff to receive a larger compensation for a retired officer than if the order went into effect immediately upon the signing by the President. This determination would rest with the Retirement Board and the President and can not be judicially considered.

The plaintiff is entitled to recover. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAMS, *Judge*, took no part in the decision of this case.

J. F. MORENO v. THE UNITED STATES

[No. 43977. Decided January 9, 1939]

On the Proofs

United States Commissioner; regulations of Attorney General.—It is held that the act of 1928, amending 28 U. S. C. 598, impliedly repealed the clause in 28 U. S. C. 597, requiring a Court Commissioner to secure Court approval of additional per diems, and the regulations of the Attorney General, so far as they exact approval of the Court of per diems involved in the instant case, contravene the amendatory act of May 29, 1928, and an exaction of this nature is void and no effect, as held in *Moreno* v. *United States*, 77 C. Cls. 780.

The Reporter's statement of the case:

Mr. J. F. Moreno per se.

Mr. Carl Eardley, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, J. F. Moreno, a citizen of the United States, is and at all times hereinafter mentioned was a United States Commissioner for the District of Arizona, residing at Prescott, Arizona.

2. In the quarter ended August 31, 1936, plaintiff as such United States Commissioner held hearings on criminal charges in certain cases pending before him, to wit, *United States* v. *Chappus; United States* v. *Gamble; United States* v. *Quihiz; United States* v. *Beck*, and *United States* v. *Galindo*. In the quarter ended November 30, 1936, plaintiff held a similar hearing in the case of *United States* v. *Polin*, and in the quarter ended August 31, 1937, plaintiff held similar hearings in the cases of *United States* v. *Campbell* and *United States* v. *Strotjost*. In each of these cases the hearing could not be completed in one day and was continued to and completed on another and subsequent date, and in his account for fees for each of such quarters plaintiff claimed a fee of $5 for the second day of hearing. These fees were disallowed by the General Accounting Office on the ground that the fees in question had not been specially approved and allowed by the District Court of plaintiff's district, as required by the regulations of the Attorney General.

3. The act of May 28, 1896, 29 Stat. 184, Title 28, Sec. 597, U. S. Code, provides as follows:

> Each United States Commissioner shall be entitled to the following-named fees, and none other: * * * for hearing and deciding on criminal charges * * * five dollars a day for the time necessarily employed: *Provided, however*, That not more than one per diem shall be allowed in a case, unless the account shall show that the hearing could not be completed in one day, when one additional per diem may be specially approved and allowed by the court.

The act of May 29, 1928, 45 Stat. 998, Title 28, Sec. 598, U. S. Code, provides as follows:

> The accounts of United States commissioners shall be rendered quarterly * * * under such regulations as

may be prescribed by the Attorney General * * *. The approval of the court as to the accounts of marshals and commissioners shall not be required.

4. The accounts hereinbefore referred to were duly prepared and forwarded by plaintiff under the act of May 29, 1928, *supra*, providing that the accounts of commissioners should be rendered quarterly under such regulations as may be prescribed by the Attorney General and transmitted through the clerk of the District Court and that "the approval of the court as to accounts of commissioners shall not be required," plaintiff's contention being that the provisions of the act of May 28, 1896, *supra*, requiring approval by the judge of the District Court, had been repealed by the act of May 29, 1928.

5. The "Instructions to United States Commissioners" issued by the Attorney General October 1, 1929, contained in its appendix the following:

> 7. Under Section 21 of the act of May 28, 1896, second per diem charge in a case must be specially approved and allowed by the court.
>
> The Commissioner must attach to his quarterly account a chronological list of cases in which an additional per diem is claimed, with an explanation as to why the hearing in the particular case could not have been concluded in one day. Such list is to be followed by a statement prepared by the Commissioner for the approval of the judge, to the effect that:
>
> Pursuant to the provisions of section 21 of the act of May 28, 1896 (29 Stat. 184), that not more than one per diem charge be allowed a Commissioner in a case unless the account shall show that the hearing could not be completed in one day, when one additional per diem may be specially approved and allowed by the court, the additional per diem claimed in the cases herein listed is hereby specially approved and allowed it being shown with respect to each of the said cases that the hearing could not be completed in one day, except as follows:
>
> The foregoing statement should be signed by the district judge after listing the per diems, if any, which are not allowed.
>
> In view of the above requirement the approval of the judge is necessary in all cases wherein a per diem has

Syllabus

been charged for the second day of hearing, irrespective of the fact that a per diem has not been charged for the date of arraignment.

6. The fees claimed herein by plaintiff were disallowed by the General Accounting Office, and on August 16, 1937, the Acting Comptroller General in an opinion sustained the disallowance on the ground that "none of the claimed per diem fees for the second hearing has been specifically approved and allowed by the court."

On November 4, 1937, the Acting Comptroller General in an opinion reaffirmed his former decision.

The court decided that the plaintiff was entitled to recover.

MEMORANDUM

The defense interposed to the allowance of the claim herein, as stated in defendant's brief, is "Did the act of 1928, amending 28 U. S. C. 598, impliedly repeal the clause in 28 U. S. C. 597, requiring a Court Commissioner to secure Court approval of additional per diems?" The court is of the opinion that it did, and that the decision of this court in *Moreno* v. *United States*, 70 C. Cls. 758, so decided.

The regulations of the Attorney General appearing in Finding 5, so far as they exact the approval of the court of per diem fees here involved, contravene the amendatory act of May 29, 1928 (45 Stat. 998), and an exaction of this nature is void and of no effect.

THE CHOCTAW AND CHICKASAW NATIONS v. THE UNITED STATES

[Congressional No. 17641. Decided January 9, 1939]

On the Proofs

Indian claims; findings under Senate Resolution of reference.—It is held (1) plaintiffs have no legal or equitable rights and (2) there is no claim but solely a request for a gift, grant, or bounty.

The Reporter's statement of the case:

Messrs. Grady Lewis and *Melven Cornish* for the plaintiff. *Mr. William H. Fuller* was on the briefs.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Carl McFarland*, for the defendant. *Mr. George T. Stormont* was on the briefs.

The court made special findings of fact as follows:

1. This case comes to this court by reason of a Resolution passed by the Senate on February 26, 1931, referring to the court a bill, then pending in the Senate, which provides for the relief of the Choctaw and Chickasaw tribes of Indians of Oklahoma and "for other purposes." The Resolution and the Bill are as follows:

Resolution

Resolved, That the claim of the Choctaw and Chickasaw Nations of Indians for compensation from the United States for the remainder of their "leased district" lands acquired by the United States under article 3 of the treaty of 1866 (14 Stat. L. 769), not including the Cheyenne and Arapahoe lands for which compensation was made to the Choctaw and Chickasaw Nations by the Act of Congress approved March 3, 1891 (26 Stat. L. 989), be, and the same is, hereby referred to the Court of Claims in accordance with the provisions of section 151 of the Judicial Code (U. S. C., sec. 257; 44 Stat. 898); and the said court is authorized and directed, notwithstanding the lapse of time or the statutes of limitation and irrespective of any former adjudication upon title and ownership, or release, to inquire into the claim of the said Indian nations for just compensation for said lands and to report the amount which in fairness and justice and under all the facts and circumstances the United States should pay to the Choctaw and Chickasaw Nations of Indians, as fair compensation for said lands, and to report its findings of fact and conclusions to the Congress, taking into consideration the circumstances and conditions under which said lands were acquired and the purposes for which they were used and the final disposition thereof.

A Bill

For the relief of the Choctaw and Chickasaw Tribes of Indians of Oklahoma, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and directed to certify to the Secretary of the Treasury, an account of the proceeds derived from the sale of the territory in Oklahoma, known as the Leased District, including the territory known as Greer County, and excluding what was formerly the Cheyenne and Arapahoe Reservation, deducting therefrom the cost of survey and sale and for allotments of Indians therein at the rate of $1.25 per acre, and there is hereby authorized to be appropriated the amount so certified to the Secretary of the Treasury for the purpose of placing the same to the credit of the Choctaw and Chickasaw Tribes of Indians of Oklahoma, upon the books of the Treasury, the balance shown by said account, to be disbursed in accordance with existing law.

2. Under the treaties of 1820, 1825, 1830, and 1837 and the patent of 1842 the Choctaw and Chickasaw Indians became the owners in fee simple of a vast body of land west of the Mississippi River. On June 22, 1855, the Choctaw and Chickasaw tribes of Indians entered into a treaty with the United States whereby the Choctaw Indians relinquished all claim to territory west of the one-hundredth degree west longitude and also made provision for the permanent settlement, within the Choctaw-Chickasaw lands, of the Wichita and certain other tribes and bands of Indians for which purpose the Choctaw and Chickasaw Indians leased in perpetuity to the United States that portion of their common territory west of the ninety-eighth degree west longitude and the one-hundredth degree west longitude. The territory between these degrees of longitude is commonly known as the "Leased District." Articles 9 and 10 of the treaty are as follows:

ART. 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in, and to any

> and all lands, west of the 100th degree of west longitude; and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the 98th degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein; excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, and whose permanent locations are north of the Canadian River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas; which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government; *Provided, however*, the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.
>
> ART. 10. In consideration of the foregoing relinquishment and lease, and, as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct. 11 Stat. 611, 613.

In consideration of the quitclaim and the lease, the United States paid the sum of $800,000; $600,000 of it was paid to the Choctaws and $200,000 to the Chickasaws. Under this lease the United States had the right to permanently settle the Wichita and such other tribes or bands of Indians as it might desire to locate thereon, excluding, however, all the Indians of New Mexico and also those whose usual ranges were north of the Arkansas River, and whose permanent locations were north of the Canadian River.

3. From the making of this treaty to 1861, the relations of these tribes and the United States were entirely friendly, but, upon the breaking out of the war between the states, the Choctaw and Chickasaw tribes, along with other Indian tribes, entered into treaties with the Confederate States. After the Civil War had ended, negotiations were entered into with these tribes and other Indian tribes for new

treaties, and in 1866 the Choctaw and Chickasaw Indians entered into a treaty with the United States whereby certain agreements were made and the "Leased District" lands were ceded to the United States for the sum of $300,000.

Articles XXX, XLIII, and XLVI of the treaty read as follows:

> ART. XXX. The Choctaw and Chickasaw Nations will receive into their respective districts east of the 98th degree of west longitude, in the proportion of one fourth in the Chickasaw and three fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw Nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow citizens, governed by the same laws, and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same or the proceeds thereof be divided per capita among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days during which the selections of land are to be made, as aforesaid, by said Choctaws and Chickasaws; and the Choctaw and Chickasaw Nations pledge themselves to treat the said Kansas Indians in all respects with kindness and forbearance, aiding them in good faith to establish themselves in their new homes, and to respect all their customs and usages not inconsistent with the constitution and laws of the Choctaw and Chickasaw Nations respectively. In making selections after the advent of the Indians and the actual occupancy of land in said nation, such occupancy shall have the same effect in their behalf as the occupancies of Choctaws and Chickasaws; and after the said Choctaws and Chickasaws have made their selections as aforesaid, the said persons of African descent mentioned in the third article of the treaty, shall make their selection as therein provided, in the event of the making of the laws, rules, and regulations aforesaid, after the expiration of ninety days from the date at which the Kansas Indians are to make their selections as therein provided, and the actual occupancy of such persons of African descent shall have the same effect in

their behalf as the occupancies of the Choctaws and Chickasaws.

ART. XLIII. The United States promise and agree that no white person, except officers, agents, and employees of the Government, and of any internal improvement company, or persons traveling through, or temporarily sojourning in, the said nations, or either of them, shall be permitted to go into said territory, unless formally incorporated and naturalized by the joint action of the authorities of both nations into one of the said nations of Choctaws and Chickasaws, according to their laws, customs, or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or be taken to interfere with or invalidate any action which has heretofore been had in this connection by either of the said nations.

ART. XLVI. Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said moneys or any other moneys of said nations in the hands of the United States; the residue, not affected by any provision of this treaty, to remain in the Treasury of the United States at an annual interest of not less than five per cent, no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively. 14 Stat. 769, 777, 779, 780.

4. The whole "Leased District" was supposed to contain 7,713,239 acres. The Wichita and Affiliated Bands of Indians were located on a tract of land in this "Leased Dis-

trict" comprising 743,610 acres. The Government settled the Cheyennes and Arapahoes on a tract containing 2,489,159 acres; the Kiowas, Comanches & Apaches on another tract containing 2,968,893 acres and there remained what is known as the "Greer County" containing 1,511,958 acres.

5. On June 4, 1891, an agreement was entered into between the United States and the Wichita and Affiliated Bands of Indians, which was not ratified until March 2, 1895, whereby these Indians conveyed to the United States absolutely and forever "all their claim, title, and interest of every kind and character" to the land occupied by them, and, in consideration of that cession, it was agreed by the United States that out of the territory ceded allotments should be made to each member of the Wichita and Affiliated Bands of Indians. 28 Stat. 876, 895, 896, c. 188. In this agreement the Wichita and Affiliated Bands of Indians claimed "that further compensation, in money, should be made to them by the United States, for their possessory right in and to the lands above described in excess of so much thereof as may be required for their said allotments." It was further provided in this agreement that a suit could be brought against the United States for any and every claim that they might believe they had a right to prefer, saving and excepting claim for a certain tract of land described in the first article of the agreement. There was included in the above act a provision that the Choctaw and Chickasaw Nations, who claim to have some right and interest in the lands which were ceded by the Wichita and Affiliated Bands, should have the right to be joined in the suit and assert their claim, which provision reads as follows:

> That as the Choctaw and Chickasaw Nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement [the agreement above referred to], which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws and to render judgment thereon, it being the intention of this act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States, and the Choctaw and Chickasaw Nations and the Wichita and Affiliated Bands of Indians in the premises, shall

be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim; and the Attorney-General is hereby directed to appear in behalf of the Government of the United States, and either of the parties to said action shall have the right of appeal to the Supreme Court of the United States: * * * *And provided further*, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw Nations have any claim to or interest in said lands or any part thereof.

That said action shall be presented by a single petition making the United States and the Wichita and Affiliated Bands of Indians parties defendant and shall set forth all the facts on which the said Choctaw and Chickasaw Nations claim title to said land. * * * *And provided further*, That it shall be the duty of the Attorney-General of the United States, within ten days after the filing of said petition, to give notice to said Wichitas and Affiliated Bands through the agents, delegates, attorneys, or other representatives of said bands that said bands are made defendants in said suit, of the purpose of said suit that they are required to make answer to said petition, and that Congress has, in accordance with article five of said agreement adopted this method of determining their compensation, if any. 28 Stat. 876, 898.

6. Pursuant to the above act, a suit was brought in the Court of Claims by the Choctaw and the Chickasaw Indians against the United States and the Wichita and Affiliated Bands of Indians. It was claimed by the Choctaw and Chickasaw Nations that the lands known as the "Leased District" were acquired by the United States "in trust for the settlement of Indians thereon, and in trust and for the benefit of said Indians when the aforesaid trust shall cease." The Court of Claims held that a trust did exist and decided in favor of the Choctaw and Chickasaw Nations. 34 C. Cls. 17. From this decree the Wichita and Affiliated Bands and the Choctaw and Chickasaw tribes of Indians and the United States severally appealed to the Supreme Court of the United States. The Supreme Court reversed the decision of the Court of Claims and held that the Choctaw and

Chickasaw Nations had by the treaty of 1855 executed a perpetual lease of the territory in dispute and that by the treaty of 1866 had made an absolute conveyance in fee simple to these lands for a consideration which could not be looked into or questioned by the court. It was further held that no trust existed and that the Choctaw and Chickasaw Nations of Indians had neither a legal nor an equitable claim and the petition was ordered dismissed. *United States* v. *Choctaw and Chickasaw Nations, Wichita and Affiliated Bands of Indians*, 179 U. S. 494.

7. By Section 15 of the Indian Appropriation Act of March 3, 1891, 26 Stat. 989, 1025, c. 543, the Congress appropriated the sum of $2,991,450 to pay the Choctaw and the Chickasaw Nations of Indians for all the right, title, and interest which said Indians may have had in and to the land occupied by the Cheyenne and Arapahoe Indians, and for the 2,393,160 acres which were left after the allotments had been provided for the said Indians. The payment of this money was not made at the time because of the action of the President of the United States in withholding it and reporting to Congress that, in his opinion, there was nothing due to the Indians for these lands. However, the Senate and the House of Representatives both adopted resolutions directing the payment of this money to the Choctaw and the Chickasaw Indians. The House resolution contained the following proviso which was added as a Senate amendment:

> *Provided, however*, That neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians for their interest in the lands of the Cheyenne and Arapahoe reservation, dated March three, eighteen hundred ninety-one, nor of this resolution, shall be held in any way to commit the Government to the payment of any further sum to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands situated in what is commonly known and called the "Leased District." 27 Stat. 753.

In the opinion of the Supreme Court in the Wichita case, *supra*, in which it is held that the Government had received the cession of the lands under the treaty of 1866, that there

was no legal or equitable claim against the Government, and that there was no trust created by the treaty of 1866 which entitled the Choctaw and the Chickasaw Nations to have reservationary interest in the land, the Court discussed the question of the policy of Congress in making the payment for the Cheyenne and Arapahoe Reservation and held that the act of 1895, under which the suit was brought, precluded by its express terms any admission on the part of the Government of any definite policy in connection with the lands which had been ceded by the treaty. Although the court was unwilling to say that the Indians had not received full and adequate consideration, nevertheless it held that any further payment was solely within the discretion of Congress and was a political and not a judicial question.

8. In 1931 Congress passed an act entitled "A Bill conferring jurisdiction upon the Court of Claims to hear, consider, and report upon a claim of the Choctaw and Chickasaw Indian Nations or Tribes for fair and just compensation for the remainder of the Leased District lands." This bill required the Court of Claims to hear and consider a claim of the Choctaw and Chickasaw Nations or tribes that they had never received fair and just compensation for the remainder of their "Leased District" land acquired by the United States under their treaty of 1866, and to report its findings to Congress, notwithstanding the lapse of time or the statutes of limitation and irrespective of any former adjudication upon title and ownership, as to what amount, in fairness and justice, the United States should pay the Choctaws and Chickasaws for said lands, taking into consideration the circumstances and conditions under which they were used, and the final disposition thereof. This bill passed both houses of Congress and was sent to the President and disapproved by him on February 18, 1931, upon the ground that to permit the institution of a suit, as provided by the bill, would violate the doctrine of *Res Adjudicata.* Senate Document 280, 71st Congress, 3rd Session.

9. With the elimination of that portion of the "Leased District," which was occupied by the Cheyenne and Arapa-

hoe tribes of Indians and for which the Choctaw and Chickasaw Nations have been paid, there remain those portions occupied by the Wichitas, 743,610 acres; by the Kiowas, Comanches, and Apaches, 2,968,893 acres; and the Greer County 1,511,958 acres, making a total of 5,224,461 acres. Out of this acreage there has been allotted to the Indians 160 acres each and the rest of the land has been opened to settlers and sold by the Government for $1.25 an acre. There must also be deducted from this acreage certain acres which were reserved for school and for educational purposes for each township.

10. From the official report of the Commissioner of Indian Affairs in the General Land Office of the Department of Interior, dated July 8, 1936, it is shown that the Kiowa, Comanche, and Apache lands comprising 2,968,893 acres had deducted therefrom 480,000 acres, known as the Big Pasture; 445,000 acres which was allotted to the Indians; and 10,310 acres which were reserved for agency, school, religious, and other purposes, thereby leaving a balance of 2,033,583 acres. It was estimated that of this remaining 2,033,583 acres, 225,953 acres were donated to the State for school purposes, leaving a balance of 1,807,630 acres open to settlement by the Government. There is nothing in the record to show that all of this land, which remained with the Government, was disposed of, but only that a majority was sold at the rate of $1.25 per acre. Assuming a sale by the Government of all of the lands at $1.25 per acre, the amount received would be $2,259,537.50. Of the 480,000 acres (Big Pasture) 100,000 acres was allotted to Indians and the balance sold for $4,864,417.05, making a total for the sale of these lands of $7,123,954.55. The lands in question were not taken by the Government, but were sold and conveyed in absolute fee to the Government upon consideration of allotments, reservations for school and religious purposes, and the payment of $2,000,000 to the Kiowa, Comanche, and Apache Indians, all of which is fully set out in an act of Congress approved June 6, 1900, ratifying the agreement with these Indian tribes, 31 Stat. 672, 676, 678.

11. Under the agreement of the 4th of June, 1891, the Wichita and Affiliated Bands of Indians ceded to the United States in absolute fee all their lands in the "Leased District" for the consideration of allotments of 160 acres to each member of the Wichita and Affiliated Bands of Indians and the right to bring a suit for further compensation in money for the absolute rights in and to these lands. This suit was brought in the Supreme Court and the court decreed in the case of *United States* v. *Choctaw and Chickasaw Nations et al., supra*, against the Indians' rights. The Supreme Court held that all interest in the land and title had been ceded to the United States and a consideration paid. The United States received from the sale of these lands, as shown by the official report, after the allotments had been made to the Indians, $458,496.63.

12. Greer County which is part of the "leased district" comprised 1,511,958 acres. After years of litigation, the Supreme Court on March 16, 1896, 162 U. S. 90, decreed that this land belonged to the United States and was not a part of the State of Texas. By the act of January 18, 1897, 29 Stat. 490, a provision was made for entry of lands in Greer County. By act of March 1, 1899, 30 Stat. 966, an amendment was made allowing parties, who had previously had the benefit of the homestead laws and who had purchased lands from the State of Texas prior to the decision of the Supreme Court on March 16, 1896, to perfect title to said lands according to the provisions of the act of 1897. The monies received from the sales of these lands were covered into the Treasury of the United States as public monies.

13. Of the 1,511,958 acres comprising Greer County the United States sold approximately 1,510,458 acres and received as consideration therefor $365,941.74, which is an average of 24 cents and a fraction per acre. At $1.25 per acre the entire area of 1,511,958 acres would be valued at $1,889,947.50.

In surveying the tract of 1,511,958 acres the United States was put to an expense of $49,700.00. The record does not establish the cost to the United States of selling the lands in Greer County, other than the cost of the survey.

Deducting the cost of the survey, $49,700.00, from the valuation of $1,889,947.50, there is left a net valuation of $1,840,247.50.

14. In compliance with the Act of Congress of August 12, 1935, 49 Stat. 571, 596, the defendant has interposed a counterclaim for "money which has been expended by the United States gratuitously for the benefit of said tribe or band." The amount of money so gratuitously expended is $1,326,651.37. This sum does not include amounts which the Government agreed to expend by treaties or agreement and includes such items as agriculture aid, household equipment, education, Indian dwellings, medical attention and hospitals, provisions, and similar items which have been held to fall under the term "gratuities" by this Court in the following cases: *Shoshone Tribe* v. *United States*, 82 C. Cls. 23, 55, 59, 93, 94; *Eastern or Emigrant Cherokees* v. *United States*, 82 C. Cls. 180; *Blackfeet et al. Tribes* v. *United States*, 81 C. Cls. 101; *Crow Tribe* v. *United States*, 81 C. Cls. 238; *Klamath et al. Tribes* v. *United States*, 85 C. Cls. 451; affirmed by the Supreme Court, 304 U. S. 119; and *The Chickasaw Nation* v. *The United States*, 87 C. Cls. 91.

CONCLUSIONS

Upon the foregoing special findings of fact, the court, in accordance with Section 151, of the Judicial Code, concluded as follows:

1. The plaintiffs have no legal or equitable rights and there has been no taking by the defendant of any lands of the plaintiffs for which the defendant has not paid a valid consideration. *United States* v. *Choctaw Nation et al.*, 179 U. S. 494, 496.

2. There is no claim made against the defendant but solely a request for a gift, grant, or bounty. Whether a gift, grant, or bounty should be made is within the sound discretion of the Congress and, being political and not judicial, this court will not express an opinion thereon. *Widmayer* v. *United States*, 42 C. Cls. 519, 524; *Sampson* v. *United States*, 42 C. Cls. 378, 385.

JOHN McSHAIN, INC., v. THE UNITED STATES

[No. 43084. Decided February 6, 1939]

On Motion for New Trial

Government contract; extra work.—Where contractor, in excavating for Government building, encountered a large quantity of reinforced concrete, not visible from the usual inspection, which it was necessary to remove, it is held that this involved extra work for which contractor is entitled to extra pay in accordance with the decision of the contracting officer.

Same.—Where there existed an admitted difference between the specifications and the work called for under the plans, involving the character of backfill over drains, and the contracting officer reached a conclusion by construing the specifications and drawing to exact a backfill of gravel by implication, and the contractor performed this extra work under protest, it is held that the contractor is entitled to recover for the added cost.

Government contract; failure to appeal.—Where contractor failed to appeal from the decision of the contracting officer, which was his right under the contract, it is held that he cannot now recover.

The Reporter's statement of the case:

Mr. Prentice E. Edrington for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. John McShain, Inc., plaintiff, is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office in Philadelphia, Pa.

2. On April 7, 1934, plaintiff entered into a written contract with the United States, which was represented by Admiral C. J. Peoples, Director of Procurement, Treasury Department, as contracting officer. Under this contract plaintiff agreed to furnish all labor and material and perform all work for clearing the site, excavation for and construction of foundations, complete, for the extension to the

Internal Revenue Building, in the square bounded by Pennsylvania Avenue, Tenth, Eleventh, and C Streets, Northwest, District of Columbia, in consideration of the sum of $149,200, all as stated in the contract, specifications, and drawings, which are of record as plaintiff's exhibits 3, 5, and 6, respectively, and are by reference made parts of this finding.

3. The contract provided that plaintiff should commence work as soon as practicable after receipt of notice to proceed, and to complete same within 120 calendar days thereafter. On April 30, 1934, plaintiff was directed to proceed with the foundation. However, on April 13, 1934, plaintiff commenced work under the contract by clearing the site.

4. Certain paragraphs of the specifications read as follows:

> 10. *Visit to site.*—Bidders should fully inform themselves as to the location of the site and as to the conditions under which the work is to be done. Failure to take this precaution will not relieve the successful bidder from furnishing all material and labor necessary to complete the contract without additional cost to the Government.
>
> 47. Bidders should examine the premises or the site of the work and inform themselves as to its character and the type of structures to be removed. Failure to take this precaution will not relieve the successful bidder from the necessity of furnishing all material and labor necessary to complete the contract without additional cost to the Government.
>
> 48. The contractor shall take the site as he finds it and shall remove all old structures within the lot lines of the entire block bounded by 10th, 11th, and C Streets and Pennsylvania Avenue NW. This work shall include the removal of interior walls, piers, partitions, chimneys, stairs, etc., in old basements or cellars, exterior walls of basements, cellars, or other excavations below grade that act as retaining walls, and all walks, paving, or floor slabs on earth will be removed as specified under excavation, filling, and grading.
>
> 58. The basis of bidding shall be that all material to be removed is earth, except as otherwise specified. The term "earth" as used in this paragraph shall be accepted as defining all material which it is practicable to remove

and handle with pick and shovel or by hand or to loosen and remove with a power shovel, including boulders up to ½ cubic yard in size.

59. If other material, not indicated on the drawings or specified herein, is encountered within the limits of the excavations required under the contract, or if the actual sub-surface conditions as encountered vary materially from the conditions as shown and specified, then the contractor shall continue with the work and shall submit to the Supervising Architect through the Construction Engineer or other authorized representative of the Government a complete report of the conditions encountered, and proper adjustment will be made in the contract as determined by the contracting officer.

5. As required by paragraph 10 of the specifications, plaintiff prior to bidding made an inspection of the site and found the following conditions: A row of two-storied buildings stood upon the west side of Tenth Street; a several-storied office building stood at the corner of Tenth and Pennsylvania Avenue; a row of two and three-storied buildings stood west on Pennsylvania Avenue; at the corner of C and Eleventh Streets, at the rear of the property, an old theater building and other structures stood; the street front of the building site had several old and abandoned buildings, with the exception of a vacant lot at the corner of Pennsylvania Avenue and Eleventh Street, which was then being used as a public parking space for automobiles. There was nothing to indicate that a building had once occupied this site, and nothing in the drawings or specifications indicated that beneath the cinder fill in the parking lot the plaintiff would encounter a solid concrete foundation which had theretofore supported the superstructure of a prior existing building.

When plaintiff's excavation operations reached this vacant lot, it for the first time discovered the reinforced concrete foundations under the cinder fill. Plaintiff immediately reported the conditions to the construction engineer, who investigated the conditions and verbally instructed plaintiff to remove the foundations encountered under the parking lot. In order to remove the hidden concrete foundations, plaintiff was required to use dynamite, perform additional work, and incur further expense in a total sum of $1,350. A bill for the

extra work was submitted to defendant through its construction engineer.

On October 4, 1934, the Director of Procurement wrote plaintiff as follows:

> In connection with your contract for clearing the site, excavation, and construction of foundations for the Internal Revenue Building Extension, this city, reference is made to your revised figure of August 9, 1934, forwarded by the Construction Engineer August 11, in amount $1,350.00 for removing old concrete foundations and cement mortar brick walls encountered below grade at the corner of 11th Street and Pennsylvania Avenue.
>
> Paragraphs 58 and 59 of the specifications on which your contract is based, state that the basis of bidding shall be that all material to be removed is earth, except as otherwise specified and that earth shall be classed as all material which it is practicable to remove and handle with pick and shovel and power shovel, and boulders up to one-half cubic yard. If other material is encountered or if the subsurface conditions vary materially from the conditions shown and specified, the contractor shall continue the work and submit a complete report of the conditions, the adjustment to be made as determined by the contracting officer.
>
> The Engineer states that the buildings on the area where the additional obstructions were encountered were removed and the space was used for parking automobiles at the time you made your bid. Therefore, you were unable to anticipate the additional excavation and these foundations and walls do not come under the classification of "earth" as defined by the specifications and were not indicated on the drawings. Your figures have been checked and are considered reasonable.
>
> Therefore, the said sum of One Thousand Three Hundred Fifty Dollars ($1,350.00) is hereby approved as an addition to your contract and without further modification of its terms, payment to be made from the appropriation "National Industrial Recovery, Treasury, Public Buildings, Procurement Division, 1933–1935," for this necessary extra and unforeseen excavation.

Upon submission of the approved claim to the General Accounting Office for payment the action of the contracting officer was disapproved, the claim was disallowed, and its payment was refused.

6. The specifications also provided as follows:

> 64. *Filling and grading.*—Excavations below the grades shall be backfilled against footings, walls, piers, etc., with suitable material free from perishable rubbish. All temporary planking, timbering, etc., shall be removed as the backfill is placed.
>
> * * * * *
>
> 66. Backfill over sub-drains outside the foundation or area walls to within 6 inches of the tops of walls shall be clean, hard gravel or broken stone or slag that will pass a 3-inch mesh and be retained on a ½-inch mesh screen. See details on Drawing No. E–404. The reinforced paper next to the backfill shall be a strong, two ply, kraft paper with asphalt membrane in the center; the paper to be reinforced with crossed fibers completely embedded in the asphalt.
>
> 67. All other backfilling shall be clean earth placed in horizontal layers not over 8 inches in depth. Each layer shall be thoroughly tamped, packed, or puddled, as directed, so that no settlement shall occur.
>
> 68. The portion of the site not covered by the building shall be backfilled to uniform slopes between the sidewalk levels and a line 2 inches below the tops of the area walls.

"Drawing E–400" is of record as plaintiff's exhibit 6, and is by reference made a part of this finding. It shows the subsurface drains which were to be installed at certain designated points: (a) With the tile drain outside the exterior foundation wall with gravel fill around the drain and extended up to within 6 inches of the finished grade; (b) with the tile drain outside the areaway wall with gravel around the tile and extending up to less than 6 inches of the finished grade; and (c) with the tile drain located under the area floor between the exterior wall of the building and the areaway wall without showing any gravel around the tile or any gravel extending up to within 6 inches of the finished grade. Dirt, not gravel, is shown by the cross section at the top.

7. In connection with the construction of the tile drains under the areaway floor slabs between the exterior foundation walls of the building and the areaway walls plaintiff's superintendent contended that gravel backfill was not re-

quired, and that he intended to backfill the drain tiles at those places with earth. The question then arose of stopping the work while this matter was decided. Plaintiff's superintendent insisted that plaintiff was entitled to payment for gravel backfill. Defendant's construction engineer contended that gravel was required around the drains. His interpretation was that although there was a difference between the specifications and the work called for on the plans, gravel was required. Defendant's construction engineer requested plaintiff's superintendent to discontinue backfilling with dirt over the drains under the floor slabs in the areaways. Plaintiff then submitted a proposal for backfilling the tile drains, 647½ cubic yards at $3.51 a cubic yard, or a total of $2,272.73.

Defendant's construction engineer, in order to prevent delay in installing the drain pipes under the areaways, requested plaintiff to proceed with the work, subject to later adjustment of cost. Thereafter, plaintiff was requested to submit a revised proposal, which it did, for 547½ cubic yards of additional stone fill, at $3.43 per yard, in a total sum of $1,877.93.

Plaintiff backfilled the drains under the floor slabs of the areaways as requested by defendant's construction engineer. Defendant's contracting officer denied plaintiff's claim for installing said gravel backfill. Plaintiff then appealed to the Secretary of the Treasury, who also rejected its claim. If the tile drains under the floor slabs of the areaways between the exterior foundation walls of the building and the areaway walls were not required to be backfilled with gravel, the sum of $1,877.93 so claimed by plaintiff for supplying gravel backfill is a reasonable amount.

8. When plaintiff had completed driving piles, it notified the Government's construction engineer that it intended to remove the pile-driving equipment from the site. On September 20, 1934, defendant's construction engineer notified plaintiff in writing as follows:

> It is understood that your plans are to remove the pile driving rig from the excavation as soon as the steel sheet piling is completed.

> Since many of the footings have not yet been checked for balance and cannot be checked until same are excavated, we are advising that this removal is at your own risk and in case it is necessary to drive additional piles to balance, no additional expenditure for expense or delay will be recommended.

9. Regarding the load test, the specifications contained the following provisions:

> 87. *Load tests.*—The contractor shall make load tests on two clusters of five piles each and on ten individual piles as selected by the construction engineer. Precast piles shall be allowed to stand at least two days before loading, and cast-in-place piles shal stand at least seven days before loading.
>
> 88. Each individual pile tested shall be loaded by means of a suitable balanced platform and heavy material with a weight of 30 tons each. After 24 hours the load shall be increased to 45 tons. After another 24 hours, the load shall be increased to 60 tons and allowed to stand 24 hours.
>
> 89. The two clusters of five piles each to be tested, shall be capped as directed, and loaded by means of a suitable balanced platform and heavy material with a weight of 150 tons each. After 24 hours the load shall be increased to 225 tons. After another 24 hours the load shall be increased to 300 tons and allowed to stand 24 hours.

10. At the time the letter of September 20, 1934 (Finding 8, *supra*), was written, the defendant's construction engineer was of the opinion that the pile driving had not been completed. It was then impossible to determine whether the driving of additional piles was necessary, inasmuch as plaintiff had not removed the dirt from the piles which had been driven. As long as the earth was on the piles it was not possible to make necessary inspection in order to determine whether any piles had to be redriven. Pending such inspection, it was necessary for the pile driver to remain on the site. Later, it was determined that it was necessary to redrive certain piles, due to the heaving of piles revealed by the load tests. Plaintiff was required to drive additional piles for which it submitted a claim in the amount of $2,077.26. Plaintiff in submitting its claim for this work, in addition to its claim for $761.61 for labor, included the sum

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of $193.75 for rental of equipment, $120.02 for 10 percent overhead, and $132.02 for 10 percent profit. Later plaintiff submitted a revised claim in the amount of $1,712.52, which amount was considered reasonable, and it was approved as an addition to plaintiff's contract without any modification of its terms. Plaintiff was paid for this extra work. Defendant's construction engineer contended that the amount paid as an extra for redriving piles covered any overhead that might have accrued. One additional pile, which had been rejected, had to be redriven because it was driven in the wrong location. This was not discovered until plaintiff was performing extra work caused by its failure to remove the earth.

11. On December 15, 1934, plaintiff submitted its claim in the amount of $565.45, as additional compensation due to 13 days' delay, from September 26 to October 12, 1934, caused by holding the pile-driver on the site after the pile driving had been completed. This amount was based upon the claim of plaintiff's subcontractor who drove the piles. The contracting officer disallowed the claim. Plaintiff requested him to reconsider his rejection, and he again rejected the claim. During these 13 days, plaintiff paid rental on the pile-driving equipment and the wages of the crew amounting to $565.45, which represents a fair rental value of said equipment and the wages actually paid by plaintiff during the 13 days. The record does not disclose that plaintiff appealed to the Secretary of the Treasury from the decision of the contracting officer.

12. Portions of the specifications relating to the removal of existing service lines provided as follows:

61. *Service lines, etc.*—Before commencing work, the contractor shall give due notice to the owners of any public service utilities, and give them reasonable opportunity to remove any of their service lines leading into or crossing the site. It is not the intention to include in this contract the cost of any new work on sewers or service lines made necessary or desirable by the removal of existing lines.

62. Abandoned or unclaimed service lines within the limits of the excavation shall be removed under this contract as a part of the excavation. The contractor shall

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> properly plug, cap, or otherwise terminate any such abandoned or unclaimed service lines that he may encounter in the course of the work.

A part of the site adjacent to the then existing Internal Revenue building, including a portion of the area of C Street, had been preempted by the defendant and ordered closed. Plaintiff's general superintendent made an examination of the site and notified all public utilities furnishing electricity, telephone service, etc., that plaintiff was starting its work under the contract, and requested them to remove their equipment from the site. Plaintiff's general superintendent found, among other things, that there was a sewer in the C Street area. He went to the sewer department of the District Government, where he was informed the sewer was alive. He then requested that it be immediately removed. The electric and telephone companies removed their lines at once, but the sewer department stated that the sewer would have to be relocated.

Plaintiff began excavating the foundation in the C Street area of the site, near 10th Street, on May 1, 1934. On May 4, 1934, after excavating to a depth of 7 feet, the sewer in the C Street area was struck. This necessitated discontinuing the excavation in this area, and plaintiff proceeded to other parts of the site.

On May 4, 1934, plaintiff notified defendant's contracting officer in writing as follows:

> We understand from the Sewer Department of the District of Columbia that a 24″ sewer at present in use in C Street, between Tenth and Eleventh, has not as yet been relocated.
>
> Inasmuch as it is utterly impossible for us to complete the excavation work in this portion of the job, we would request that you have the proper District authorities relocate this sewer and grant us an extension of time until C Street can be turned over to us.

On May 9, 1934, defendant's acting supervising engineer wrote plaintiff as follows:

> Receipt is acknowledged of your letter of May 4th in which you request an extension of time under your con-

> tract for foundations, Internal Revenue Building, this city.
>
> This request is made for the reason that a sewer line in C Street, which the District Commissioners have been authorized to divert, has not yet been removed.
>
> The condition of the site and the status of work in progress give no evidence that the existence of the sewer, where C Street must be excavated, has caused any delay in the progress of your work, or will do so in the near future. Demolition of buildings is still in progress and the site is covered with debris where razing has been partially completed.
>
> Inability to excavate the section of C Street at this time is not regarded as a cause of delay, and will not be so considered unless conditions at the site justify your claim, which it is your privilege to renew if [at] any time you are in a position to substantiate it.

Plaintiff was requested to submit a proposal for removing the sewer, and on May 14, 1934, plaintiff proposed, in writing, to relocate the sewer for $5,495, the work to start immediately and to be completed in three weeks. The proposal was not accepted. The sewer was relocated by the District Government.

The sewer had not been cut off when the excavation work was completed in the other parts of the foundation site. On June 4, 1934, defendant's construction engineer notified plaintiff that the sewer was dead and might be removed. The work was held up approximately one day before the excavation could be again started in the C Street area. After excavating the remaining portion of the site, plaintiff retraced its steps across the excavated portion of the site and returned to the C Street area. This necessitated expense for a planked roadway and the building of a new ramp. The removal of excavated material from the C Street area was more costly. On June 15, 1934, plaintiff's subcontractor submitted a claim for additional payment of $397.50, because of extra expense required in completing the excavation in the C Street area. Plaintiff submitted a similar claim for the same extra to the contracting officer, who disallowed it. No appeal was taken by plaintiff from the decision of the contracting officer, to the Secretary of the Treasury.

The court decided that the plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This case is now before the court upon plaintiff's motion for a new trial.

The plaintiff is a Pennsylvania corporation known as John McShain, Inc. On April 7, 1934, plaintiff contracted in writing with the United States to furnish all labor and materials and perform all work for clearing the site, as well as to do all essential excavation and construct foundations for the erection of an extension to the Internal Revenue Building in Washington.

The work exacted by the contract and specifications included the site bounded by Pennsylvania Avenue, Tenth, Eleventh, and C Streets NW., and the expressed consideration was $149,200. On this site were a number of buildings (Finding 5) which plaintiff was to remove, and in connection with the necessary excavation to be made plaintiff was advised by the specifications that "The term 'earth' as used in this paragraph shall be accepted as defining all material * * * practicable to remove and handle with pick and shovel or by hand * * * including boulders up to ½ cubic yard in size."

Within the limits of the site was a large vacant lot covered with cinders, and underneath the surface, in nowise visible from the usual inspection, was a large quantity of reinforced concrete put there in former years as a foundation for the building which had originally stood thereon. Plaintiff was told to remove the concrete and submit to the Supervising Architect through the construction engineer a claim for so doing. This the plaintiff did.

Paragraph 59 of the specifications reads as follows:

> If other material, not indicated on the drawings or specified herein, is encountered within the limits of the excavations required under the contract, or if the actual sub-surface conditions as encountered vary materially from the conditions as shown and specified, then the contractor shall continue with the work and shall submit to the Supervising Architect through the Construc-

tion Engineer or other authorized representative of the Government a complete report of the conditions encountered, and proper adjustment will be made in the contract as determined by the contracting officer.

Plaintiff's claim for $1,350 for performing this work was allowed and approved in accord with the contract and specifications (Finding 5). The General Accounting Office sought to reverse the allowance, and did disapprove and disallow its payment. The defendant does not challenge plaintiff's right under the law to receive a judgment for the sum involved. There are a great number of cases upholding plaintiff's right to recover. We will not cite them all. *Penn Bridge Co.* v. *United States*, 59 C. Cls. 892, and *McShain Co.* v. *United States*, 83 C. Cls. 405, are in point. Judgment for $1,350 will be awarded the plaintiff on this item.

What we previously said and held with respect to the facts as found in Findings 6 and 7 was erroneous. Plaintiff's motion for a new trial covering this item points out the error as to the principle of law applicable.

Paragraphs 66 and 67 of the specifications are as follows:

> 66. Backfill over sub-drains outside the foundation or area walls to within 6 inches of the tops of walls shall be clean, hard gravel or broken stone or slag that will pass a 3-inch mesh and be retained on a ½-inch mesh screen. See details on Drawing No. E-404. The reinforced paper next to the backfill shall be a strong, two ply, kraft paper with asphalt membrane in the center; the paper to be reinforced with crossed fibers completely embedded in the asphalt.
>
> 67. All other backfilling shall be clean earth placed in horizontal layers not over 8 inches in depth. Each layer shall be thoroughly tamped, packed, or puddled, as directed, so that no settlement shall occur.

Sub-drainage was provided for at three different locations, i. e., outside the exterior foundations, outside the areaway wall, and underneath the center portion of the concrete slab. It is conceded that with respect to the first two locations the plans and specifications exacted a backfill composed of clean, hard gravel or broken stone or slag that would pass a 3-inch mesh and be retained on a ½-inch mesh screen.

Plaintiff complied with the above plans and specifications respecting sub-drainage and was paid therefor.

It is by this suit contended that the backfill over the sub-drainage to be placed beneath the areaway concrete slab, which extended from the exterior foundation wall of the building to the outer limits of the concrete slab areaway, was to be composed of clean earth as stated in paragraph 67 of the specifications. The plaintiff was not permitted by the construction engineer to use clean earth. He was required by this official to backfill with clean, hard gravel as provided in specification 66. Plaintiff did not assent to doing the work in accord with the construction engineer's views.

During the course of existing differences over the backfill item, the construction engineer in order to forestall an apparent delay in finishing the work requested the plaintiff in writing to proceed with the same and at the same time said "your observance of this request to proceed with the work" will be the subject of an adjustment of the costs later on. Using a backfill of gravel increased the plaintiff's cost of doing the work by the sum of $1,877.93.

Specification 66 refers to Drawing E-404 and this drawing points out where the subsurface drains are to be installed, and does not provide for a backfill of gravel as to the tile drain to be installed underneath the center of the concrete slab.

It is admitted that a difference existed between the specifications and the work called for under the plans and this difference was as to the character of backfill over the drains. Drawing E-404 expressly discloses an entire absence of any requirement to backfill the drainage area under the center of the concrete slab with gravel, and the determination of this question involved not a determination of facts but an interpretation of the contract, drawing, and specifications.

The contracting officer, in order to reach a conclusion, did of necessity predicate the same by construing the specifications and drawing to exact a backfill of gravel for the drain under the concrete slab by implication. It could not have

been done otherwise, for it is clear that no express language imposed this duty upon the contractor. The official was in doubt and his request to the contractor to proceed in accord with his wishes and later adjust the issue indicates that what was to be determined was a construction of the scope of the contract, specifications, and drawing.

The case of *Davis* v. *United States*, 82 C. Cls. 334, 346, is similar to the instant one. In the *Davis case* this court held—

> There is no question that parties to a contract are competent to make a stipulation of this kind, and its provisions, when made, are binding upon them. But the competency of the parties to so stipulate, as the courts have many times pointed out, is limited to the decision of questions of fact arising under the contract, such as the quantity and quality of materials delivered, whether the work performed meets contract requirements, causes of delay in the performance of the work, etc. These are questions of fact, the correct solution of which is usually largely dependent on professional knowledge and skill. They are questions which the parties to a contract may properly submit to the determination of the contracting officer or head of the department and lawfully agree to be bound by his decision.

The plaintiff performed this extra work under protest. As a matter of fact, a proposal for performing it and the added cost involved were furnished to and considered by the defendant, and, notwithstanding the fact that subsequent to its rejection the plaintiff proceeded under the contract to obtain an extra allowance, we now think that under the decision of this court in the *Davis case*, *supra*, the plaintiff is entitled to a judgment for $1,877.93 for performing this extra work. The amount the plaintiff seeks is not challenged by the defendant and it will be included in the final award.

The plaintiff seeks to have included in any judgment awarding it damages the sum of $565.45 alleged to have been paid as rental for pile-driving equipment and wages of a crew to operate the same for thirteen days. When plaintiff

notified the construction engineer that pile driving was completed and the pile-driving equipment was to be removed from the site of the work, the engineer gave express notice that the pile driving had not been completed, and the removal of pile-driving equipment as contemplated would be at the risk of the contractor.

The notice of intention to remove the pile-driving equipment was given September 20, 1934. Following this notice, and subsequent to the expiration of the thirteen-day period of delay claimed, the plaintiff performed extra work which involved the employment of this pile-driving equipment, and for this extra work the plaintiff received the sum of $1,712.52, the amount claimed by it in full payment for the same. In view of the status of the pile-driving work on the date the plaintiff notified defendant of its intention to remove the pile-driving equipment it would have been extremely hazardous to have removed it. The pile-driving work had not been completed. See findings 8, 9, 10, and 11.

Paragraphs 61 and 62 of the specifications are as follows:

> 61. *Service lines, etc.*—Before commencing work, the contractor shall give due notice to the owners of any public service utilities, and give them reasonable opportunity to remove any of their service lines leading into or crossing the site. It is not the intention to include in this contract the cost of any new work on sewers or service lines made necessary or desirable by the removal of existing lines.
>
> 62. Abandoned or unclaimed service lines within the limits of the excavation shall be removed under this contract as a part of the excavation. The contractor shall properly plug, cap, or otherwise terminate any such abandoned or unclaimed service lines that he may encounter in the course of the work.

A portion of C Street was included within the site of plaintiff's contract work, and the above specifications point out expressly what was to be done with respect to removing service lines remaining therein. The plaintiff in making inspection of the premises discovered a sewer. Some dispute obtains as to whether plaintiff knew the sewer was alive or dead. The dispute is immaterial. Plaintiff did receive

knowledge that it was alive and information that it was the intention of the District Government to relocate it.

Excavation was commenced by plaintiff within the C Street area on May 1, 1934, and three days later the sewer was struck. Excavation within the area was discontinued, and on the same day, May 4, 1934, the plaintiff notified the defendant's contracting officer that the District Government had not relocated the sewer and requested an extension of time until C Street could be turned over to the contractor. May 9, 1934, the contracting officer denied an extension of time, and also rejected a contention that the failure to relocate the sewer had in anywise retarded the progress of plaintiff's contract work. The record discloses that the contracting officer was right, and that the plaintiff was not delayed because of the removal of the sewer.

The plaintiff did not appeal from this decision, as it had a right to do under the contract. Failure to do so renders it impossible to sustain the contentions advanced for a judgment for the amount of this item in suit. *Davis case, supra.* See also *Penn Bridge Co., supra*, wherein it was held, as to a contention similar to the one now advanced, as follows:

> It is sought to distinguish this case from those cited by the contention that in those cases the authorized officers were finding facts, while the officer in this case was reaching a legal conclusion. If the contention could be of any force under any circumstances, it is sufficient to say that the determination by the contracting officer that the delay was the fault of the United States was the determination of a fact [p. 899].

Plaintiff's motion for new trial is allowed; the former findings, judgment, and opinion (November 14, 1938) are vacated and withdrawn, and new findings with judgment and this opinion are this day filed.

Judgment for the plaintiff for $3,227.93. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WILLIAMS, *Judge*, took no part in the decision of this case.

PACIFIC FRUIT EXCHANGE v. THE UNITED STATES

[No. 42799. Decided February 6, 1939]

On the Proofs

Income tax; ascertainment of loss.—Where plaintiff corporation, engaged in the business of growing and in packing and marketing for itself and others, fruits and other crops, as an incident of such business made a cash advance to another corporation, also engaged in growing fruits and other crops, and the two corporations entered into a mortgage-marketing contract, securing to the mortgagee (plaintiff) exclusive right to furnish the supplies essential for packing the crops and the right to market the same on a commission basis; and where the mortgagor corporation defaulted on principal and interest on bonds issued under an indenture securing a mortgage on all its assets; and where the plaintiff purchased such assets at foreclosure sale, paying cash therefor; and where plaintiff entered upon its books the assets so purchased at a cost equivalent to the price paid at foreclosure sale plus the amount of indebtedness due from the defaulting corporation, and also made entries on its books balancing and charging off plaintiff's account with the corporation, it is held that plaintiff is entitled to deduct from its gross income the unpaid debt as a loss incurred in the year in which the transaction took place.

Same.—Legal precedents establish the rule that no particular form of charge-off is required; it is sufficient if the book entry discloses that the debt is worthless and has not been paid.

Same; mortgage marketing contract—A mortgage-marketing contract is an indenture of dual character, and is intended to secure to the mortgagee the exclusive right to furnish the supplies essential for packing the crops and the right to market the same on a commission basis. The contract creates a lien in favor of the mortgagee upon the realty of the mortgagor as well as upon his growing and harvested crops.

The Reporter's statement of the case:

Mr. John A. Selby for the plaintiff. *Messrs. Lawrence A. Baker, Henry Ravenel,* and *Athearn, Chandler, and Farmer* were on the brief.

Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson, Fred K. Dyar*, and *J. W. Blalock* were on the brief.

The court made special findings of fact as follows, upon a stipulation:

1. Plaintiff during all of the years hereinafter mentioned was and now is a California corporation engaged in the business of growing, harvesting, furnishing supplies for packing, and marketing fruit and other crops on a commission basis. As an operating feature of this business and solely in the furtherance of this business, plaintiff enters into mortgage-marketing contracts with growers in the State of California whereunder the crops and real estate of the grower are mortgaged to plaintiff under terms whereby plaintiff secures the valuable privilege of packing for shipping and marketing at commission for a stated number of years the entire crop of such grower and in return advances certain funds for the protection, growing, and harvesting of such crops.

2. During the years 1922–1928 inclusive and up to January 15, 1929, Hiawatha Farm, a California corporation, was engaged in the business of growing fruits on lands owned by it in the State of California.

3. As of April 1, 1922, Hiawatha Farm executed and delivered to First Federal Trust Company, as Trustee (which First Federal Trust Company was later succeeded by Crocker First Federal Trust Company), a certain first trust indenture upon all its real and personal property to secure an issue of its first mortgage seven per cent serial gold bonds.

4. Pursuant to a permit dated May 12, 1922, issued by the Commissioner of Corporations of the State of California and the first trust indenture heretofore mentioned, Hiawatha Farm issued and sold its first mortgage seven percent serial gold bonds in the principal amount of $250,000, none being purchased by plaintiff.

5. On February 7, 1923, Hiawatha Farm executed in favor of plaintiff a mortgage-marketing contract. By the terms of this instrument Hiawatha Farm agreed to mar-

ket through plaintiff its entire crop of deciduous fruits for the years 1923–1932, inclusive, grown upon certain lands owned by it at certain agreed commissions and likewise mortgaged to plaintiff as security for any and all advances made or to be made by plaintiff its entire crop of deciduous fruits grown or to be grown by it on said premises during that period of time.

On November 18, 1924, Hiawatha Farm executed a second mortgage-marketing contract for additional advances and in every way the same as that previously executed. Copies of the mortgage-marketing contracts are attached to the petition as Exhibits "A" and "B" and made a part hereof by reference.

6. Pursuant to the contracts, plaintiff made advances to Hiawatha Farm and also pursuant to the contracts plaintiff harvested the fruit, sold the same and credited the proceeds received from sales against advances so made. On January 15, 1929, the advances so made exceeded the credits received in the sum of $174,017.71, so that there was a net balance due from Hiawatha Farm to plaintiff in this amount.

7. Hiawatha Farm defaulted in payment of interest on its first mortgage bonds (referred to in Finding 4) and on October 1, 1928, likewise defaulted in payment of principal amounts then due. Thereupon the trustee, Crocker First Federal Trust Company, declared the first trust indenture to be in default and pursuant thereto elected to sell the property covered by the indenture. The sale was duly held on January 15, 1929, at which time the property was offered for sale at public auction to the highest bidder for cash. Plaintiff bid for the property the sum of $186,123.47, which was the highest bid offered. Plaintiff thereupon paid the sum to the trustee in cash and was given a deed to the property. The amount for which the property was sold did not exceed the principal of the bonds then outstanding plus accrued interest and the necessary costs of sale. In making such purchase plaintiff had no agreement forgiving or reducing the indebtedness with Hiawatha Farm and received no preference by reason of the indebtedness due it from Hiawatha Farm and none

of the indebtedness was credited on its bid. At no time has plaintiff held any stock in Hiawatha Farm nor had any means of controlling the farm except in respect of the mortgage-marketing contracts referred to in Finding 5.

8. By reason of the foreclosure sale Hiawatha Farm was from and after the date thereof without any assets or property with which to pay its indebtedness to plaintiff and was likewise incapacitated from in any way carrying out or fulfilling any of the other terms of the mortgage-marketing contracts or of either of them. The fact of this inability to pay and incapacity to carry out the terms of these contracts was known to plaintiff at the time of the sale. Hiawatha Farm has made no payment since that date to plaintiff on account of the indebtedness nor acquired any assets with which to make any payment on account thereof or to comply with the other terms of the contracts.

9. Under date of April 15, 1929, credit entries were made on plaintiff's books of account and original records whereby its account with Hiawatha Farm was balanced and closed. Preceding that date and after the purchase of the property of Hiawatha Farm at foreclosure sale on January 15, 1929, entries reflecting the cost of the property were made on plaintiff's books. Other entries were made in the assets accounts of plaintiff charging as capital cost the amount of the bid at the foreclosure sale (see Exhibit 3) and also the open account (see Exhibit 1) already balanced and closed. The bookkeeping record both of the account and the purchase is herewith submitted as follows:

Exhibit 1.—Photostatic copies of ledger pages of the Hiawatha Farm account beginning in 1923 and ending April 15, 1929, on which date the account then amounting to $174,017.71 was balanced and closed. The items of accrued interest were included by petitioner as income in its Federal tax returns.

Exhibit 2.—Photostatic copy of Pacific Fruit Exchange journal voucher dated January 29, 1929, reflecting the purchase of the property of Hiawatha Farm from the Crocker First Federal Trust Company.

Exhibit 3.—Photostatic copy of Pacific Fruit Exchange ledger page 1 setting up as an asset as of January 29, 1929, the property of Hiawatha Farm at the amount of the bid at the foreclosure sale and

showing the transfer of the amount so set up to another account as of April 15, 1929.

Exhibit 4.—Photostatic copy of Pacific Fruit Exchange ledger account No. 1–A reflecting the liability to Crocker First Federal Trust Company for $186,123.47, being the purchase price owing on account of the purchase of the property of said Hiawatha Farm.

Exhibit 5.—Photostatic copy of Pacific Fruit Exchange journal voucher dated April 15, 1929, crediting and closing out Hiawatha Farm account $174,017.71 (see Exhibit 1) and the Hiawatha Farm bank claim account $186,123.47 (see Exhibit 3) and setting up as assets Building—Hiawatha Farm $125,000 and Real Estate—Hiawatha Farm $235,141.18.

Exhibits 6 and 7.—Photostatic copies of Pacific Fruit Exchange ledger sheets reflecting the entry of Buildings and Real Estate Hiawatha Farm in the ledger of Pacific Fruit Exchange in consequence of the entries made in journal voucher dated April 15, 1929 (see Exhibit 5).

Exhibit 8.—Photostatic copy of Pacific Fruit Exchange journal voucher dated July 1, 1931, crediting real estate and debiting surplus as of January 15, 1929, with $174,017.71, the amount of the Hiawatha Farm account, which had been balanced and closed on April 15, 1929 (see Exhibit 1).

10. On or about March 15, 1930, plaintiff filed with the Collector of Internal Revenue for the First District of California a return of income for the calendar year 1929 and paid on March 15, June 16, September 16, and December 15, 1930, the quarterly installments of tax shown to be due by the return, the total amount paid being $14,106.34. In computing net taxable income on the return plaintiff did not deduct either as a bad debt or as a loss the sum of $174,017.71.

11. Under date of August 7, 1931, plaintiff filed an amended return for the year 1929 and a claim seeking refund of the entire tax paid by it for that year, the amended return and claim being based upon the plaintiff's claim of the right to deduct from gross income the sum of $174,017.71. Copies of both original and amended returns are attached to the stipulation as Exhibit 9. A copy of the claim is attached to the petition as Exhibit "C" and made a part hereof by reference.

12. Under date of September 23, 1932, the Commissioner of Internal Revenue rejected the claim for refund, a copy of the letter of rejection being attached to the petition as Exhibit "D" and made a part hereof by reference.

13. No action upon the plaintiff's foregoing claim has been had before Congress or either House thereof, or any of the Departments of the Government, other than the Treasury Department, or in any other court.

The court decided that the plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This tax case is submitted upon an agreed statement of facts. The plaintiff, a California corporation, is engaged in growing, packing, and marketing deciduous fruits and other crops. Its business activities embrace growing crops upon its own account, and entering into mortgage-marketing contracts with other growers. It is this last phase of activities which gave rise to this litigation.

A mortgage-marketing contract is an indenture of dual character, and is intended to secure to the mortgagee the exclusive right to furnish the supplies essential for packing the crops and the right to market the same on a commission basis. The contract creates a lien in favor of the mortgagee upon the realty of the mortgagor as well as upon his growing and harvested crops.

The consideration moving to the mortgagor consists of money advances to provide for the cultivation, etc., of the designated crops, and other outlays connected with the enterprise, as well as the acquisition of a marketing agent interested and engaged in a similar business.

The terms of the indenture provide that the mortgagee is to receive payment of advances and interest thereon out of the proceeds of the sale of the crops, accounting to the mortgagor for any surplus remaining after deducting, in addition to the advances, the agreed-upon commission due the mortgagee. Incidental expense of supplies for packing the crops was to be paid for by the mortgagor.

The Hiawatha Farm, a California corporation engaged in growing fruits and other crops, and the plaintiff entered

into two mortgage-marketing contracts. The first one is dated February 7, 1923, and the other November 18, 1924, to run until 1932. From time to time plaintiff advanced money to the Hiawatha Farm until on January 15, 1929, it owed the plaintiff $174,017.71, which it could not pay.

The Hiawatha Farm corporation in April 1922 lawfully executed a first trust indenture upon all its assets to secure an issue of its first mortgage seven percent serial gold bonds, and in May 1922 issued and sold $250,000 of such bonds. October 1, 1928, Hiawatha Farm defaulted in payment of the principal and interest due upon the bonds, and the Crocker First Federal Trust Company, under the first trust then owned by it, foreclosed the same.

All the assets of the Hiawatha Farm corporation were sold January 15, 1929, under the first trust indenture and the plaintiff being the highest bidder purchased the same for $186,123.47. The plaintiff at no time owned any of the stock of the Hiawatha Farm corporation; it paid in cash to the trustee the purchase price mentioned, and it is conceded that no agreement of any kind existed wherein the plaintiff covenanted to either forgive or reduce the amount of Hiawatha Farm indebtedness to it as a part consideration for the purchase.

Upon completion of sale of the assets of Hiawatha Farm under the first trust, the above-mentioned amount, $174,-017.71, stood on plaintiff's books as a debt due from Hiawatha Farm for loans theretofore made by plaintiff. Upon foreclosure of the trust, Hiawatha Farm was without assets and the debt to plaintiff was worthless.

Plaintiff in entering upon its books this transaction with reference to the first trust foreclosure charged as the cost of the property of Hiawatha Farm the purchase price paid in cash, and added thereto the amount of the indebtedness due from the corporation. At the same time an entry was made balancing and charging off plaintiff's account with Hiawatha Farm and closing the same. Plaintiff knew then and knew at the time of the sale that the debt was worthless and treated it as such by balancing and closing its account with the corporation.

Plaintiff on March 15, 1930, filed its income tax return for the calendar year 1929, which disclosed a tax due in the sum of $14,106.34, which was paid in installments. In the return filed the plaintiff computed its net taxable income in accord with the book entries noted above, and as to the transaction involved did not take a deduction from gross income of the unpaid debt due it from the Hiawatha Farm corporation.

August 7, 1931, plaintiff filed an amended return for 1929, claiming the deduction, and a refund claim seeking the refund of its entire income tax. It is conceded that if plaintiff is entitled to recover, the judgment should be for the sum of $14,106.34 and interest thereon.

The Revenue Act of 1928 (45 Stat. 791, 800) is as follows:

> (f) Losses by corporations.—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.
>
> (j) Bad debts.—Debts ascertained to be worthless and charged off within the taxable year (or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part. [Sec. 23.]

The plaintiff contends that it is entitled to deduct the amount of the indebtedness due it from Hiawatha Farm, either as a bad debt or a business loss. It is true that plaintiff's business relations under the mortgage-marketing contracts with the Hiawatha Farm corporation obligated it to make certain advancements, and it is asserted that it was an indispensable feature of the transaction in order to procure the rights and earn any possible profits from the same. It is said in the brief that financing transactions of this character was an established custom of the trade.

The defense interposed is seemingly rested upon a contention that recognizes the $174,017.71 due the plaintiff from the Hiawatha Farm corporation as a bad debt, but insists that the record establishes the fact that it was not ascertained to be worthless and charged off within the taxable year. To sustain this contention, the fact of plaintiff's treatment of the transaction, reflected in its book entries,

and the period of time elapsing between the first and the amended return filed by plaintiff, are cited as proof that plaintiff intended to treat the indebtedness as part of the cost price of the assets of the corporation, and when the property was disposed of compute its gain or loss upon this basis.

Tested by business experience, it is manifest that the plaintiff had reason to doubt its ability to collect the sum due from the Hiawatha Farm corporation on the date the corporation defaulted in paying the interest on and the sums due upon the principal of the bond issue. However, the corporation possessed assets, continued in business, and the absolute worthlessness of the debt was not ascertained until the sale of the assets was made. On that date the plaintiff ascertained the essential facts exacted by the revenue law.

It is conceded that legal precedents establish the rule that no particular form of charge off is required. It is sufficient if the book entry discloses that the debt is worthless and has not been paid. Plaintiff's books did show that the debt had not been paid; they reflected its worthlessness. The adding of the debt to the purchase price of the property of the Hiawatha Farm as was first done was, as plaintiff states, "inept bookkeeping." That entry however had no effect upon the closing of the account with the corporation in connection with the other entry which exhibited the worthlessness of the debt. *Stapley Co. Inc.* v. *Commissioner*, 13 B. T. A. 557, *American Cigarette & Cigar Co.* v. *Bowers*, 92 Fed. (2d) 596; *Huning Mercantile Co.*, 1 B. T. A. 130, 132; *Mason Machine Works*, 3 B. T. A. 745, 750–751; *Chas. E. Fenner*, 5 B. T. A. 772, 778; *United States* v. *S. S. White Dental Mfg. Co.*, 274 U. S. 398.

The determination of worthlessness and the charge off were not rendered ineffective by the entry which plaintiff made in its real estate account. The property in the real estate account belonged to plaintiff absolutely, and the Hiawatha Farm corporation had no interest therein. For tax purposes the plaintiff could not at any future time have added the indebtedness of the Hiawatha Farm to the purchase price of the property purchased and paid for under

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the foreclosure, either for the purpose of depreciation or for gain or loss. Such indebtedness was not a part of the bid or purchase price of such property. It remained after the foreclosure as before—a debt to plaintiff from Hiawatha Farm, and the facts clearly show that plaintiff determined the same to be worthless and charged it off as worthless within the taxable year.

Plaintiff paid cash for the assets of the Hiawatha Farm corporation. The indebtedness of the corporation to plaintiff did not enter into the sale in any way. The bank's foreclosure of its prior lien and the sum received by the trustee for the corporation's assets absolutely precluded the plaintiff from collecting the debt involved, and it is our opinion that the book entries, although erroneous as to the sale transaction, were sufficient to constitute a proper charge off within the taxable year, and the plaintiff is entitled to the deduction claimed.

Judgment will be awarded the plaintiff in the sum of $14,106.34, with interest thereon as provided by law. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge,* concur.

WILLIAMS, *Judge*, took no part in the decision of this case.

MICHAEL T. HAYES v. THE UNITED STATES

[No. 43509. Decided February 6, 1939]

On the Proofs

Retired pay under the "Economy Act."—Where enlisted man in the United States Army, having served as commissioned officer in the World War, was retired, under the provisions of Section 8 of the Act of June 6, 1924, on the retired pay of a warrant officer, it is held that his pay comes under the provisions of Section 212 (a) of the Act of June 30, 1932 (the "Economy Act") when such retired pay, combined with the annual rate of compensation of a civilian position under the United States Government, held by him, exceeds $3,000 per annum.

The Reporter's statement of the case:

Ansell, Ansell & Marshall for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

In this case the plaintiff, who was retired on March 15, 1926, as a staff sergeant, United States Army, seeks to recover $1,280.87 for the period July 1, 1932, to September 30, 1936, and an additional amount to date of judgment, representing deductions made under section 212 (a) of the Act of June 30, 1932, from his retired pay of a warrant officer.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff is a retired enlisted man of the Regular Army of the United States with the grade of staff sergeant, having been retired on March 15, 1926, with credit of over thirty years of active service in the Army for retirement purposes.

He first enlisted April 6, 1902, and was assigned to the Signal Corps; served in the Philippine Islands from May 25, 1902 to December 15, 1904, and was honorably discharged April 4, 1905; reenlisted April 6, 1905 for duty in the Signal Corps; served in Cuba from October 14, 1906 to April 5, 1908, and was honorably discharged April 5, 1908; reenlisted April 19, 1908, for duty in the Signal Corps; served in Alaska from June 1, 1908 to July 25, 1910, and was honorably discharged April 18, 1911; reenlisted April 19, 1911, for duty in the Signal Corps, and was honorably discharged May 12, 1913; reenlisted June 5, 1913, for service in the Signal Corps; left the United States June 19, 1913, for duty in the Philippine Islands and was honorably discharged June 4, 1917, reenlisted June 5, 1917, at Manila, P. I.; returned to the United States July 14, 1917, and was honorably discharged September 1, 1917, at Fort Mason, California, to accept a commission. He reenlisted December 31, 1920, and was honorably discharged December 30, 1923, by reason of expiration of term of service, a staff sergeant, Signal Corps; reenlisted December 31, 1923, and was retired March 15, 1926, a staff sergeant, 4th Signal Service Company, Signal Corps, Fort Jay, N. Y.

He was appointed a First Lieutenant, Signal Corps, September 2, 1917, and was honorably discharged a First Lieutenant, Signal Corps, December 30, 1920.

2. The plaintiff was temporarily appointed military storekeeper in the Signal Service at Large, Governors Island, New York, October 17, 1928, at a salary rate of $1,800 per annum; given an excepted appointment to the same position October 25, 1928, under the provisions of paragraph 2, section IV, Schedule "B", Civil Service Rules and Regulations, and promoted March 8, 1930, to the salary rate of $1,860 per annum. He has served continuously in this position at the salary rate of $1,860 per annum from March 8, 1930, to the present time.

3. During the period from July 1, 1932, to September 30, 1936, both dates inclusive, the latter date being that of the latest available record, the plaintiff, a retired enlisted man, was paid by the finance officer, United States Army, the pay of a retired warrant officer under the Act of June 6, 1924, 43 Stat. 472, as reduced by section 106 of the Act of June 30, 1932, 47 Stat. 406 and by the Acts of March 20, 1933, 48 Stat. 12, and March 28, 1934, 48 Stat. 521, less certain deductions made through the assumed application thereto of section 212 of the Act of June 30, 1932, *supra*, all as hereinafter shown in finding 6.

4. During the same period from July 1, 1932, to September 30, 1936, as referred to in the preceding finding, the plaintiff was paid as a military storekeeper, Signal Service at Large, at the rate of $155 per month less certain deductions (from July 1, 1932, to March 31, 1935, both dates inclusive), made on account of section 106 of the Economy Act of June 30, 1932, section 217 of the Act of March 20, 1933, *supra*, and section 21 of the Act of March 28, 1934, *supra*.

In the month of June, 1934, plaintiff received the net sum of $124 as retired pay and $139.50 civilian pay as a military storekeeper, a total of $263.50 or $13.50 in excess of the amount authorized to be paid under the provisions of section 212 (a) of the Act of June 30, 1932, *supra*.

The amounts of retired and civilian pay received by plaintiff from July 1, 1932, to September 30, 1936, are shown in the computation set forth in the reply of the General Ac-

counting Office filed herein on September 3, 1937, which is made a part hereof by reference.

5. If plaintiff has been entitled to receive the retired pay of a warrant officer without deduction therefrom by reason of the provisions of section 212 of the Act of June 30, 1932, *supra*, there would be due him for the period from July 1, 1932, to September 30, 1936, the sum of $1,280.87, together with a further sum for the period from October 1, 1936, to date of judgment.

If plaintiff was entitled to receive the retired pay of a warrant officer with deductions authorized by the provisions of section 212 of the Act of June 30, 1932, he has been paid $13.50 in excess of the amount that he was entitled to receive in the month of June 1934.

6. Prior to the institution of this suit plaintiff submitted a claim to the General Accounting Office for refund of the amount deducted from his pay for July 1932, as a retired enlisted man under section 212 of the Act of June 30, 1932, but payment was denied by the Comptroller General by decision designated A-47778 dated April 3, 1933.

7. The following tabulation shows the periods from July 1, 1932, to September 30, 1936, and (1) the monthly rate of pay of retired warrant officer with reductions authorized by section 106 of the Act of June 30, 1932, and Acts of March 20, 1933, and March 28, 1934; (2) the monthly deduction made on account of application of section 212 of the Act of June 30, 1932; and (3) the monthly pay which was paid to and received by plaintiff:

July 1, 1932, to March 31, 1933	$127.19	$19.27	$107.92
April 1, 1933, to January 31, 1934	117.94	------	117.94
February 1 to May 31, 1934	124.88	14.38	110.50
June 1934	124.88	.88	124.00
July 1, 1934, to March 31, 1935	131.81	29.06	102.75
April 1, 1935, to September 30, 1936	138.75	43.75	95.00

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The question in this case is whether the provisions of section 212 (a) of the Act of June 30, 1932, 47 Stat. 406, com-

monly called the "Economy Act," impose any limitation upon the pay of a retired enlisted man who, upon retirement, received the retired pay of a warrant officer by reason of having served as a commissioned officer during the World War when such retired pay, combined with the annual rate of compensation of a civilian position under the United States Government, exceeded $3,000 per annum.

At the time of plaintiff's retirement he was an enlisted man in the United States Army with the grade of staff sergeant with a credit of over thirty years active service for retirement purposes. The facts show that he served as an enlisted man from 1902 until September 1, 1917, and as a first lieutenant in the Signal Corps from September 2, 1917, until he was honorably discharged December 30, 1920. He reenlisted as a private December 31, 1920, and served as an enlisted man until he was retired March 15, 1926, as a staff sergeant.

Under the provisions of section 8 of the Act of June 6, 1924, 43 Stat. 470, 472, the plaintiff upon his retirement became entitled by reason of his commissioned service to the retired pay of a warrant officer and since his retirement he has received the retired pay of a warrant officer, less the deductions mentioned in finding 7. Section 8, *supra*, provides that the retired enlisted men of the Army theretofore or thereafter retired who served honorably as commissioned officers in the army of the United States at some time between April 6, 1917, and November 11, 1918, should be entitled to receive the pay of retired warrant officers of the Army.

Section 212 (a) of the Economy Act of June 30, 1932, provides as follows:

> After the date of the enactment of this Act, no person holding a civilian office or position, appointive or elective, under the United States Government, * * * shall be entitled, during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in any of the services mentioned in the Pay Adjustment Act of 1922 [U. S. C., title 37], at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than $3,000; and when

the retired pay amounts to or exceeds the rate of $3,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect. As used in this section, the term "retired pay" shall be construed to include credits for all service that lawfully may enter into the computation thereof.

"(b) This section shall not apply to any person whose retired pay plus civilian pay amounts to less than $3,000: *Provided*, That this section shall not apply to regular or emergency commissioned officers retired for disability incurred in combat with an enemy of the United States.

Plaintiff contends that the retired pay of a retired warrant officer which he was entitled to receive as an enlisted man is not within the limitation of section 212 for the reason that the provisions of that section were intended to apply only to the pay of retired officers who were retired as such officers. Section 212 (a) clearly imposes a limitation upon retired pay of any person entitled to retired pay "for or on account of services as a commissioned officer" who holds a civilian position, the pay of which, combined with such retired pay, exceeds $3,000 per annum. In the section involved, the Congress, in imposing this limitation, was clearly concerned with the *amount* of retired pay of *any person*, which retired pay was for or on account of services as a commissioned officer. It is clear from section 8 of the Act of June 6, 1924, *supra*, that plaintiff's retired pay of a retired warrant officer was allowed to and received by him "from the United States for or on account of services as a commissioned officer" in the United States Army. Except for the provisions of this act, plaintiff's retired pay as a retired enlisted man would have been $83.25 a month. In these circumstances it seems clear that the retired pay of plaintiff is within the plain language and intent of section 212 (a). This section does not mention the retired pay of enlisted men or of commissioned officers, but it specifically states that no person who holds a civilian office under the United States Government shall be entitled, during the period of such incumbency, to retired pay from the United States Army for or on account of service as a commissioned

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officer when his combined *retired pay* and civilian pay exceeds $3,000 a year. The act further states that, as used therein, the term "retired pay" should be construed to include credits for all service which lawfully might enter into the computation thereof. Plaintiff's retired pay, which was measured by the retired pay of a retired warrant officer, was clearly on account of services as a commissioned officer in the United States Army during the period September 2, 1917, to December 30, 1920, and, since the act expressly applies to any person receiving retired pay on account of such services, the deductions in question were properly made and plaintiff is not entitled to recover. The petition is therefore dismissed, and it is so ordered.

WHALEY, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAMS, *Judge*, took no part in the decision of this case.

ALLIED AGENTS, INC., A CORPORATION, v. THE UNITED STATES

[No. 44038. Decided February 6, 1939]

On Demurrer

Income tax; constitutionality of the statutes imposing taxes on capital stock and excess profits.—It is held that the capital stock tax is an adjunct of the excess-profits tax, and its provisions were framed with a view to the use of what is termed the "declared value" as the basis of the excess-profits tax; the capital stock tax should not be considered as if that tax were alone and segregated from the excess-profits tax but the two taxes should be considered together and their validity must depend upon the results of their joint operation and the joint effect upon the taxpayer.

Same.—Congress had the right to prescribe the basis for the two taxes, and this plan was made self-adjusting; there is nothing arbitrary in permitting the taxpayer to make his election as to the valuation of the capital stock he would declare.

Same.—The fact that the taxpayer is given by the statute the right to do some act which will affect the amount of its tax in one of its phases, or cancel it entirely, will not by itself and alone render the statute imposing the tax invalid.

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Same.—It is impossible to adjust many taxes so that they will apply with uniformity to each and every taxpayer; taxation is not an exact science and discrimination cannot always be avoided, and since no absolute rule can be laid down prescribing the degree of uniformity required, if it is reasonable, considering the general nature of the tax which is applied, the statute will not be invalid.

Same.—There is nothing arbitrary in permitting the taxpayer to elect the amount it would declare as the valuation of its capital stock and precluding either party thereafter from making a change in the amount elected; there is nothing discriminatory in these provisions.

Same.—There is no delegation of legislative power in the provision which permits the taxpayer to fix the amount of the tax, since nothing that the taxpayer does or can do affects anyone but itself; the corporation performs no legislative duty in making the election or choice of the amount which it will declare, and Congress is not exceeding its power in granting to the taxpayer the right of election as to the amount to be declared unless it results in so gross and arbitrary a discrimination between the taxpayers as to invalidate the tax.

Same.—In the instant case it is held that the taxpayer cannot under any reasonable hypothesis absolutely determine the amount of its taxes which will depend upon its profits as ascertained at the end of the year; in attempting to lessen its taxes it may actually increase the amount thereof and all the taxpayers have an opportunity to obtain a fair and reasonable rate for the tax which is self-adjusting except in very unusual or extraordinary circumstances.

Same.—The contention that the capital stock tax of 1935, being computed on the declared value for the previous year is based upon mere supposition or guess, and therefore has no proper foundation, is plausible and might be given weight if the actual value of the stock were sought instead of an amount upon which the taxpayer states he is willing to be taxed in connection with the excess-profits tax; the statute, however, does not require the actual value to be stated, nor does it permit either party to amend the return to show the actual value; it merely requires that the plaintiff shall elect the value which it will declare.

Same.—Title I of the National Industrial Recovery Act was held invalid in the *Schechter* case, but the decision has no application to Title II.

Same.—It is held that the provisions of subsection (c) of Section 201 of Title II do not show that the tax was levied for a specific purpose and not for general revenue; the Congress had the power under the Constitution to make the revenue produced available for certain purposes; if the funds were made available for specific purposes by another statute, the authority of

Congress so to provide would not be questioned, and the result is the same when such a provision is inserted in the taxing act itself. *U. S.* v. *Butler*, 297 U. S. 1, distinguished.

Same.—The funds raised by the tax are not to be used for any unconstitutional purpose; the two taxes were both levied for revenue.

The Reporter's statement of the case:

Mr. Charles M. Trammell, Jr., for the plaintiff. *Mr. C. M. Trammell* was on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

GREEN, *Judge*, delivered the opinion of the court:

The material facts set forth in the petition are as follows:

The plaintiff, a corporation, filed capital stock tax returns for the years ending June 30, 1933, 1934, 1935, and 1936, declaring the value of its capital stock at $1,500,000, $800,-000, $886,817.66, and $1,400,000, respectively, and paid taxes thereon in accordance with the statute made and provided. Later, and in due time, plaintiff filed claims for the refund of the taxes so paid. These refund claims were rejected and the plaintiff now brings this suit alleging that the statute imposing these taxes is unconstitutional and void. The defendant demurs to the petition on the ground that no cause of action is stated therein.

Section 215 of Title II of the National Industrial Recovery Act, 48 Stat. 195, 207, imposes an annual tax on domestic corporations of $1 for each $1,000 of the adjusted declared value of its capital stock, and subdivision (f) of this section further provides that—

> * * * the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section * * *.

The same subdivision provides for an adjustment in this declared value for changes in the capital structure, but makes

no provision for adjustment for changes resulting from the vicissitudes of business other than as stated above.

Section 216 (a) imposed an excess-profits tax upon the net income of every corporation taxable under section 215 equivalent to 5 per cent of such portion of its net income for such income-tax taxable year as is in excess of 12½ per cent of the adjusted declared value of its capital stock, as determined in section 215.

The capital stock tax and excess-profits tax were reimposed by sections 701 and 702 of the act of 1934 without making any change material to the case now under consideration except that the declaration which is to be used as the basis of the 1934 and 1935 tax was required to be made within one month after the close of the fiscal year ending June 30, 1934, and for the year 1934 the declared value was the basis of the tax. For the year 1935, the basis was the declared value for 1934 adjusted for certain changes in the capital structure not necessary to mention here. Section 105 of the revenue act of 1935 made another change and permitted a new declaration for 1936.

Under the revenue act of 1935, the excess-profits tax rates upon the net income of corporations subject to the capital stock tax are 6 per cent on such portion thereof as is in excess of 10 percent and not in excess of 15 per cent of the declared value; the portion of the net income in excess of 15 per cent of the adjusted declared value is taxed 12 per cent.

The plaintiff contends that the capital stock tax is uncertain, discriminatory, arbitrary, and deprives it of its property without the equal protection of the law; and in particular, that it raises a conclusive presumption that the declared value is the actual value and that the actual value for 1935 is the same as the declared value for 1934. The provisions of the capital stock tax are also said to constitute an unconstitutional delegation of legislative authority to the taxpayer without any standard for its exercise.

A fundamental error in the position taken by plaintiff, as we see the case, is that the capital stock tax is treated as having no connection with the excess-profits tax and the dependence of the excess-profits tax upon the declared value used in the capital stock tax is considered as having no

bearing in the determination of the case. We think an examination of the provisions of these two taxes and a consideration of the problem presented to Congress show clearly that the capital stock tax is an adjunct of the excess-profits tax, and that its provisions were framed with a view to the use of what is termed the "declared value" as the basis of the excess-profits tax. It follows that the objections raised by plaintiff to the capital stock tax should not be considered as if that tax were alone and segregated from the excess-profits tax but the two taxes should be considered together and their validity must depend upon the results of their joint operation and the joint effect upon the taxpayer.

The original excess-profits tax was imposed at the time of the World War and repealed in 1921, although it would seem that nothing could be more fitly made the subject of taxation than excess profits. The debates in Congress show there were two important reasons for its repeal. One was that the original excess-profits tax was imposed in accordance with the percentage of profits upon the statutory invested capital of the taxpayer and both the Bureau of Internal Revenue and the taxpayer had the greatest difficulty in determining the amount of invested capital which was made the basis of the tax. This in fact constituted about the greatest task that the Bureau of Internal Revenue had. The other reason was that seldom if ever did the tax work out fairly and equitably as between the different taxpayers. Being based upon the amount of capital originally invested, an old corporation, whose assets and actual capital had multiplied in value many times over, would pay a very much higher tax than a recently formed corporation which had bought out other companies at a high valuation and consequently had a much greater invested capital with no greater capital assets, notwithstanding the two companies manufactured the same product which they sold at the same price. Indeed, so great was the disparity that sometimes one that sold at a lower price paid the higher taxes. This was because the tax was based and computed upon the amount of capital originally invested and not on the value of the assets employed or used in making the profits taxed. The system was such that the lower the amount of invested

capital the higher became the rate of the tax. Nothing was added to the base of the tax on account of the growth of capital either in the form of tangible assets or goodwill. The discrimination was so great in many cases that it was one cause for the enactment of the statute providing for special assessments. Manifestly this was unfair, inequitable, and in one sense discriminatory. Nevertheless the old statute was held to be constitutional.

Congress had the right to establish a basis for the capital stock tax if the Constitution was not infringed in so doing, and we think it was not.

The form of the statutory provisions now under consideration shows plainly that Congress wished and intended to tax excess profits but desired to take a new basis for the computation of the tax that would present no difficulties in determining the amount of the original investment or the value of capital stock so that the tax would be easily administered by the Bureau of Internal Revenue and so easily computed by both the Government officials and the taxpayers that there could be no dispute about its amount and no uncertainty in its application. If we consider the the two taxes independently of constitutional questions we find that they are very simple—perhaps the most simple of any of the taxes that depend directly or indirectly upon the income of the taxpayer, and when the two taxes are taken together we think it can be shown that they operate with a greater degree of fairness and equity than the old excess-profits tax. When we examine the constitutional questions that have been raised with reference to them, we find that the two taxes are inseparable and must be considered together.

It is argued that the capital stock tax is purely arbitrary, and discriminatory to a degree that renders it invalid. Possibly if this tax were viewed alone and by itself, without making it a part of the plan for the excess-profits tax and considering the result of the two taxes, this argument might require different consideration. But as we have already shown, the two taxes must be considered together. The main purpose of the new plan for levying these two taxes was to do away with the difficult and innumerable con-

troversies in determining the actual value of invested capital or capital stock; let the taxpayer make a declaration of the value of the capital stock; and then apply an excess-profits tax framed in such a way that there would be an inducement to the taxpayer to place a fair and reasonable value on the stock and if it did not, would so increase the excess-profits tax that little or nothing would be gained by putting an unreasonably low value thereon. This plan made the taxes self-adjusting and, as before stated, Congress had the right to prescribe the basis for the two taxes. It prescribed the declared value as this basis. We think it is clear that there is nothing arbitrary in permitting the taxpayer to make his election as to the amount he would declare. Congress simply waived the right to revise this declaration. It is urged, however, that this provision had a discriminatory effect as to other taxpayers and that when the taxpayer declared the value of the stock it fixed the amount of its tax. It is further argued that in so permitting the taxpayer to fix the amount of the tax, Congress delegated legislative powers and made the tax so discriminatory that for both or either of these reasons it was rendered invalid. The fact, if it be a fact, that the taxpayer is given by the statute here involved the right to do some act which will affect the amount of its tax in one of its phases, or cancel it entirely, will not by itself and alone render the statute imposing the tax invalid. This often occurs under statutes the constitutionality of which never has been doubted. For example, a taxpayer who would otherwise be chargeable under other taxing provisions with a tax on a certain amount of income may sell stocks which he owns at a loss and use the loss to reduce or entirely cancel the amount of his taxable income. Moreover, except in very unusual situations such as no statute can guard against, the taxpayer cannot control the taxes that it will pay under the two statutes under consideration by its statement as to the declared value. These statutes are so framed that the higher the declared value of the capital stock the lower will be the excess-profits tax, and the lower the declared value the higher will be the excess-profits tax. In this way when the two taxes are considered together, as they should be, they are as stated above self-adjusting both

as to the taxpayer itself and in comparison with what is paid by others under them.

Counsel in another and similar suit has cited a supposed case as an example of the discriminations that might result. It is possible that such a case might exist but so improbable that it is reasonably safe to say nothing like it ever did or ever will come to pass. Under the supposition made, it is stated that the declared value of the taxpayer's capital stock was $500,000. It is supposed that this represented the true value of the stock at the beginning of the year for which it was declared. Then it is supposed that another corporation, whose capital stock was worth $1,000,000, had a net income for the same year of $62,500, and it is said it could under the law declare a capital stock value of $500,000, pay the same capital stock tax the first taxpayer paid on half that amount of capital, and escape entirely the excess-profits tax. There are inconsistencies in this hypothetical case. In the first place it should be noted that the tax does not apply to corporations that are not doing any business. The capital stock of a corporation doing business which usually and ordinarily had a net income above taxes of only $62,500 would hardly be worth $1,000,000 as counsel supposes. But if it were worth that amount and had so small an income no injustice has been done in not requiring it to pay an excess-profits tax. Moreover, the supposition that it would declare the value of its stock to be only half of its actual value is an unreasonable hypothesis as well as the supposition that its profits would be so small. The declaration must be made at the beginning of the year when the taxpayer can only make an estimate as to what the net income will be and there are few corporations that could or would take the risk of so reducing the declared value of their capital stock as to subject themselves to the likelihood of having very heavy excess-profits taxes imposed. The statutes imposing these two taxes are so drawn that there is an inducement, as commentators have noted, to declare the value of the stock at approximately its full amount or a little more in order to avoid any chance of having heavy excess-profits taxes imposed. In the hypothetical case presented the smaller corporation, by declar-

ing what was assumed to be the full value, may have and probably did escape excess-profits taxes which it would otherwise have paid, while the larger corporation gained little in the excess-profits taxes by reducing the declared value. Counsel has presented no case of undue discrimination that actually existed but merely a hypothetical case based on a supposition which is contrary to the manner in which the act works out in practice. There are many taxes as to which hypothetical cases can be made up which will present, as between taxpayers, a strong discrimination; but in actual practice the two taxes under consideration are much more likely to work out fairly and with less discrimination than the old excess-profits tax which seldom if ever operated without more or less discrimination and often compelled one taxpayer having the same amount of profits as another to pay many times more taxes than a competitor which was using no greater amount of capital.

It is easy to cite examples of cases in other fields of taxation where the discrimination is far more gross than is possible to even imagine could exist under the statutes now in controversy. Perhaps the most conspicuous example of discrimination is found in the administration of State taxes on intangible property (notes and securities of various kinds). This discrimination has led to these taxes being abolished in some States and an income tax or some other tax substituted instead. But most of the States of the Union still keep the tax upon intangible property under which the taxpayer makes a return of the value thereof and the usual practice is to accept this return without any consideration of whether it is the real value of the securities to be taxed. The result has been that a taxpayer having a comparatively small amount of intangible property, of which he declares the value with a reasonable degree of accuracy, will often pay far more than some very wealthy resident of the same community who makes a declaration of the value of his intangibles in a small amount and who ought to pay many times more than the other party. This gross discrimination has been a matter of common knowledge. It has often been the subject of public discussion and its gross inequities referred to by writers on taxation. These conditions have existed for

more than a century, but so far as we are aware no claim has ever been made that the statute was invalid by reason thereof except in an action commenced some years ago in the city of Chicago wherein it was sought to enjoin the collection of the tax on account of this discrimination, which was notorious in that city; but the court to which the matter was presented dismissed the petition. In such instances the tax collecting officials had authority to review the valuation stated by the taxpayer but the statute also permitted them to waive or abandon this right. In that case the waiver of the right to review was accomplished by the officials; in the case before us, it is provided as a matter of policy by the statute. This difference in procedure does not affect the result.

In the case of *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392, it is said with reference to taxation in general:

> The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, * * *.

Different taxpayers present an almost infinite number of varying conditions and it is impossible to adjust many taxes so that they will apply with uniformity to each and every taxpayer. Taxation is not an exact science and discrimination cannot always be avoided. The ideal tax would be one which when applied always operated with absolute equality between taxpayers. But while this ideal should be sought it is seldom attained, and the difficulty is greatest when framing taxes in accordance with ability to pay. No absolute rule can be laid down prescribing the degree of uniformity required, but it is safe to say that if it is reasonable considering the general nature of the tax which is applied, the statute will not be invalid. We are clear that when the self-adjusting principles of the two taxes are considered the results of their application will show a reasonable degree of uniformity, fairness and equity between the taxpayers. It would be impossible to adjust the system of applying the capital stock tax and the excess-profits tax "so as to render it precisely equal in its bearing."

It is urged that the statute raises a conclusive presumption that the declared value is the actual value. We think

this is clearly erroneous. The taxpayer itself is permitted to name the value. In other words, it elects what value it will fix as the basis of the tax. Instead of presuming that the declared value is the actual value, the actual value is immaterial. It has already been shown that the form of the statute indicates quite clearly that it was the intention of Congress to eliminate all questions as to value by permitting the taxpayer to declare a value which could be changed neither by the taxpayer nor the defendant. There is nothing arbitrary in permitting the taxpayer to elect the amount it would declare and precluding either party thereafter from making a change in the amount elected, nor do we think there is anything discriminatory in these provisions.

It is also contended that the statute permits the taxpayer to fix the amount of the tax and thus delegates to it legislative powers. But nothing that the taxpayer does or can do affects anyone but itself. The corporation performs no legislative duty in making the election or choice of the amount which it will declare, and the Congress is not exceeding its power in granting to the taxpayer the right of election as to the amount to be declared unless it results in so gross and arbitrary a discrimination between the taxpayers as to invalidate the tax. It is said that there is no standard from which to determine the basis of the tax but the word "standard" as used in this connection, as we understand it, pertains simply to a definite method of ascertaining the tax which is clearly pointed out by the statute. It has already been shown that the fact that the acts of the taxpayer in some measure determine the amount of the tax it will pay does not invalidate the tax. Moreover, in the case before us, the taxpayer cannot under any reasonable hypothesis absolutely determine the amount of its taxes which will depend upon its profits as ascertained at the end of the year. In attempting to lessen its taxes it may actually increase the amount thereof as many taxpayers have found. All the taxpayers have an opportunity to obtain a fair and reasonable rate for the tax which is self-adjusting except in very unusual or extraordinary circumstances.

The tax has been examined and considered at three different sessions of Congress, and until recently no question has

been raised as to its constitutionality. This matter was not even mentioned at any of the hearings on the Revenue Bills. The report of the Senate on the revenue bill of 1934 states with reference to the capital stock and excess-profits taxes that these taxes have been certain in yield (not uncertain as is here argued), easily borne by the taxpayer, and easily administered by the Bureau of Internal Revenue; that the only serious criticism brought to the attention of the committee is that certain taxpayers having fiscal years ending on July 31, or later in the year, might be obliged to file two returns, and that otherwise the taxes have been "very satisfactory in their operation up to date." This defect was remedied by the new bill and a new opportunity was given to declare the value of a corporation's capital stock for the year ending June 30, 1934, which the committee said met any serious charge of unfairness. The committee report also stated that "a reasonable original declared value is assured by means of the excess-profits tax which is based on the relation of the net income of the corporation to such declared value." No claim has ever been made to Congress that in actual practice the bill worked unfairly or unjustly except in some minor matters which Congress has corrected, and in respect to the value declared in one year being made the basis of the tax for another year. There was no contention or even suggestion that any of these matters, or any other, rendered the bill unconstitutional. The taxes under consideration appear to us to have the merits of being just in their inception, "easily paid and easily administered," and in practice working with a high degree of fairness and equality considering the difficult subject involved. It seems to us that they ought not to be declared unconstitutional because cases can be imagined in which they might work unfairly.

It is specially urged in the instant case that the capital stock tax of 1935, being computed on the declared value for the previous year, is based upon mere supposition or guess and therefore has no proper foundation. The argument at first glance seems plausible and might be given weight if the actual value of the stock were sought instead of an amount upon which the taxpayer states he is willing to be

taxed in connection with the excess-profits tax. But as we have seen before, the statute does not require the actual value to be stated, nor does it permit either party to amend the return to show the actual value. It merely requires that the plaintiff shall elect the value which it will declare. The declaration also, as stated above, will be made with a view to the excess-profits taxes that may be imposed, and for the year 1935, like the other years, the amounts of the two taxes will be self-adjusting.

It is argued in another case before this court that section 215 of the National Industrial Recovery Act was unconstitutional and invalid in that the National Industrial Recovery Act was itself unconstitutional and because the tax was levied for a specific purpose and not for general revenue. This point is not raised in the instant case but as it may be brought up later on we think it well to pass on it at this time.

Title I of the National Industrial Recovery Act was held invalid in the case of the *Schechter Corp* v. *United States*, 295 U. S. 495. But as far as we are aware it has never before been contended that Title II was unconstitutional. Section 209 thereof provided that "the President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this Title." This is a form often used in the statutes and its use does not render a statute unconstitutional. Without reviewing the decision in the *Schechter case*, *supra*, we think it is clear that it has no application to Title II of the National Industrial Recovery Act.

It is said that subsection (c) of section 201 of Title II provides—

> (c) All such compensation, expenses, and allowances shall be paid out of funds made available by this Act,

and that the funds made available included the capital stock tax provided in section 215. It is contended that this provision in Title II of the 1933 capital stock tax statute shows that the tax was levied for a specific purpose and not for general revenue and such a provision is beyond the power of Congress.

What Congress did by the provision quoted above was merely to make the revenue produced available for certain purposes. Clearly Congress had power under the Constitution to do this. If the funds produced by the tax were made available for specific purposes by another statute, no one would question the authority of Congress to so provide and the result is exactly the same when such a provision is inserted in the taxing act itself. The case of *United States* v. *Butler*, 297 U. S. 1, and other cases cited in support of the contention stated above are not in point. In the *Butler case*, it appeared that the tax was imposed as part of a "plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government" and that the tax was inseparable from this plan. The situation in the case before us is not at all similar. The funds raised by the tax are not to be used for any unconstitutional purpose, for we are here concerned only with Title II. The two taxes were both levied for revenue purposes and have been quite successful in that respect. We find nothing in the provision last discussed that affects the validity of the tax.

It will be observed that the petition does not allege that an honest mistake was made in any of the returns under consideration or that it was sought to file an amendment to a return within the time for amending returns generally as was the case in *Glenn* v. *Oertel Co.*, 97 Fed. (2d) 495, and the opinion in that case consequently has no application to the one before us. The contention of the plaintiff is simply that the act is unconstitutional for reasons which we have considered and deemed not well founded.

Conceding for the sake of the argument that the objections to the statute raised by the plaintiff present some difficult and doubtful questions, we think under such circumstances the doubt should be resolved in favor of the constitutionality of the act and accordingly so hold.

It follows that the demurrer should be sustained and the petition dismissed. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAMS, *Judge*, took no part in the decision of this case.

JESSE MAYER v. THE UNITED STATES

[No. 42092. Decided March 6, 1939]

On the Proofs

Income tax; division of profits and losses under trading agreement.— The plaintiff seeks to recover an alleged overpayment of income taxes for the year 1929 on the ground that the brokerage partnership of which he was a member had an agreement with an individual to operate in certain securities on joint accounts and providing that profits from such operations should be equally divided but that losses should be borne entirely by the partnership, but it is held that the evidence sustains the conclusion that the losses as well as the profits were to be shared equally between the partnership and the individual.

The Reporter's statement of the case:

Mr. Eugene Meacham for the plaintiff.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

Plaintiff is a citizen of the United States residing in the city of New York.

On March 15, 1930, the plaintiff filed his income tax return for the calendar year 1929 disclosing a tax liability of $16,-602.39 on which, in the year 1930, he paid $8,302.81. In 1931 plaintiff filed a claim for refund of $8,299.68 and for abatement of assessed taxes of $8,299.67. As grounds for this claim the plaintiff stated, among other things, that he was a partner in the firm of A. L. Scheuer & Company and that in 1929 the firm neglected to report losses which occurred in that year approximating $350,000, that the taxpayer's proportionate share of these losses amounting to approximately $150,000 was not included in his individual return for 1929, and that if he had included his share of the above-stated losses he would have no tax to pay for 1929.

The Commissioner of Internal Revenue on June 9, 1932, allowed the claim in the amount of $7,222.48, which amount was abated, leaving an outstanding balance due from the plaintiff for the year 1929 of $1,077.20 which has never been paid.

It appears from the testimony that plaintiff was a member of the partnership of A. L. Scheuer & Company which was engaged in the brokerage business. Arnold L. Scheuer had a 55.5 per cent interest in the partnership, plaintiff had a 39.5 per cent interest, and one Charles Ambrecht, cashier and office manager, had a 5 per cent interest.

During the year 1929 Scheuer & Company operated in certain stocks with one John J. Bergen under joint accounts in accordance with an oral agreement which provided that the partnership and John J. Bergen should each participate in 50 per cent of the profits or sustain 50 per cent of the losses as the case might be. During the year 1929 losses were sustained in the total amount of $413,074.70 in the joint accounts under the oral agreement.

By agreement of counsel, during the taking of evidence herein, an examination was made of plaintiff's return for 1929 and his records by an auditor of the Bureau of Internal Revenue. During this examination the auditor interviewed the taxpayer and his accountant. At the conclusion thereof, he submitted a recomputation showing, among other things, the tax liability of the plaintiff for the year 1929. This recomputation which was approved by the Commissioner of Internal Revenue discloses a deficiency in the tax for 1929 in the amount of $3,303.20. In arriving at this deficiency, the auditor allowed to the partnership of A. L. Scheuer & Company one-half of the losses sustained in the joint accounts with John J. Bergen, and 39.5 per cent of that amount was treated as plaintiff's share of said losses and accordingly allowed to him. This computation was a correct statement of the plaintiff's tax liability for 1929 in accordance with the undisputed facts in the case and the oral agreement between the partnership and Bergen as above recited.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit to recover an alleged overpayment of income taxes for the year 1929 during which the plaintiff was a member of the partnership of A. L. Scheuer & Company, which was engaged in a brokerage business. His interest in this partnership was 39.5 per cent. Of the remainder, Arnold L. Scheuer held 55.5 per cent, and Charles Ambrecht, cashier and office manager, had an interest of 5 per cent. During the year 1929 the partnership of A. L. Scheuer & Company had in effect an oral agreement with one John J. Bergen to operate in certain securities on joint accounts. These operations during that year resulted in a loss of over $350,000.

While this action was pending, by agreement of counsel, the Bureau of Internal Revenue made an examination and audit of the plaintiff's return for 1929 and this recomputation, which was approved by the Commissioner of Internal Revenue, disclosed a deficiency in the tax for 1929 in the amount of $3,303.20. In arriving at this deficiency the auditor allowed the partnership of A. L. Scheuer & Company one-half the losses sustained in the joint accounts with John J. Bergen, and 39.5 per cent of that amount was treated as plaintiff's share of said losses and accordingly allowed to him.

The plaintiff claims the agreement between the partnership and Bergen with reference to his operations in stock was in effect that the partnership would receive one-half of the profits, if any, but in case the operations resulted in a loss the partnership was to bear the entire amount thereof. The case turns wholly upon the question of whether such an agreement was in force as the plaintiff claims; in which event the entire loss of Bergen's operations being chargeable to the partnership and the plaintiff's part thereof being 39.5 per cent, the amount of plaintiff's deductible loss would exceed the amount of income which he otherwise received and no tax would be due from him. This is wholly a question of fact depending upon the evidence adduced.

Opinion of the Court

Plaintiff's claim with reference to this agreement is supported by the testimony of Bergen. That a concern which furnished the money or the responsibility for operations in stocks should make an agreement to bear all the losses and receive only half the profits is so extraordinary as to cast a doubt upon its existence. This agreement plaintiff alleges was entered into by Scheuer on behalf of the partnership and Bergen himself. The defendant, however, introduced the testimony of Scheuer, who denied that he had any such agreement and said that the transactions which were handled jointly by the partnership and Bergen were on the basis of each sharing 50 per cent of the profits or losses. The testimony of Scheuer was supported by that of Charles Ambrecht, who was manager and cashier of the partnership of Scheuer & Company and advised with reference to all contracts, agreements, and arrangements on the part of the partnership. He testified that his understanding was that the agreement between the partnership and Bergen was on a fifty-fifty basis and that the matter was handled in that manner on the books. There was other testimony which supported the contention of the defendant that the agreement with Bergen was in effect that he and the partnership were to share and share alike in the profits and losses resulting from the joint transactions in stock handled by Bergen.

The commissioner who heard the testimony of the witnesses rejected the testimony of Bergen and concluded that the accounts between the partnership and Bergen were joint in character, each sharing equally therein, and that there is a deficiency in plaintiff's tax account for the year 1929. With this conclusion on the part of the commissioner the court, after reexamination of the evidence, is entirely satisfied.

It follows that plaintiff's petition must be dismissed and it is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAMS, *Judge*, took no part in this decision.

CLIFFORD J. CUNNINGHAM v. THE UNITED STATES

[No. 43405. Decided March 6, 1939]

On the Proofs

Income tax; inclusion of income of another.—Where plaintiff in his income tax return for 1926 included in his taxable income an amount which was in reality the income of another; and where the money to pay the tax on this income erroneously reported as plaintiff's was furnished to plaintiff by another, it is held that plaintiff, having filed a timely claim for refund of the overpayment for 1926, has an equitable right to recover.

Same.—Where the corporations which paid to plaintiff the money with which to pay the excess tax were denied the right to claim such payments as deductions, it is held that such denial is not a bar to plaintiff's right to recover the excess tax paid; plaintiff was the taxpayer within the meaning of the statute.

Account stated.—A letter from the Commissioner, referring to revenue agent's report recommending overassessment, does not constitute an account stated.

Same.—An account stated cannot be predicated upon implication and conjecture; it must be a positive and definite statement of a balance due.

The Reporter's statement of the case:

Mr. Jacob Rabkin for the plaintiff. *Mr. Mark H. Johnson* was on the brief.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiff seeks to recover overpayments of $2,948.33 for 1926 and $856.03 for 1927, totaling $3,804.36, with interest. He bases his right to recover on an alleged account stated and, also, upon a timely claim for refund filed for 1926. The defenses interposed are, first, that there was no account stated, and, second, although plaintiff filed a timely claim for 1926, he is not entitled to recover for that year because the money with which he paid the tax which he seeks to recover was furnished to him by another.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. March 15, 1927, plaintiff filed an income tax return for 1926 showing a net income of $43,045.80 and a tax of $3,581.08, which was paid in four equal installments of $895.27 on March 15, June 17, September 16, and December 20, 1927. March 15, 1928, he filed a return for 1927 showing a net income of $27,122.69 and a tax of $1,383.46, which was paid in four installments of $345.87 on March 15, June 15, and September 15, 1928, and $345.85 on December 15, 1928.

2. On January 11, 1930, the Commissioner of Internal Revenue advised plaintiff by letter as follows:

> Your income tax assessed for the year 1926, appears to be in excess of the amount due, for the reason that income of Seth Seiders was reported on your return.
> The limitation imposed by law is about to expire as to the year involved, after which a refund or credit cannot be made of any amount ultimately found to have been overpaid, unless a claim is filed before the expiration of such limitation. It is, therefore, suggested that you prepare a claim upon the enclosed Form, specifically setting forth in such claim the grounds or basis of the apparent overpayment.

The Commissioner enclosed with his letter a claim for refund form and on March 12, 1930, plaintiff in accordance with the provisions of law in that regard duly executed and filed the claim requesting the refund of an overpayment for 1926 in the amount of $3,050.83. As a part of this claim, plaintiff set forth the following computation of overpayment for 1926:

Net income reported	$43, 045. 80
Tax paid on reported net income	3, 581. 08
Income of Seth Seiders reported	21, 920. 00
Corrected net income	21, 125. 80
Corrected income tax	530. 25
Income tax overpaid	3, 050. 83

3. July 23, 1930, plaintiff wrote the Commissioner as follows:

> Will you kindly advise me as to status of claim for $3,050.83 filed in March of this year.

> I filed this claim after conferring with Mr. Dwight W. Green, Asst. U. S. Attorney in Chicago, when I appeared as a Government witness in the case of the Government vs. Seth Seiders, of Chicago.

In reply to this letter the Commissioner wrote plaintiff on August 20, 1930, with reference to his refund claim and his taxes for 1924 to 1927, as follows:

> Reference is made to your letter dated July 23, 1930, requesting that you be advised as to the status of a claim for refund of 1926 income tax filed with the Collector of internal revenue for the Third New York District on March 12, 1930.
>
> You are advised that an examination has been made by a revenue agent of your income-tax liability for the years 1924 to 1926, inclusive, which indicates an overassessment for those years aggregating $3,804.36. This report has been received by the Income Tax Unit but action has been deferred pending settlement of related taxpayers' cases.
>
> It is believed probable that settlement will be made of the related taxpayers' cases within the next few months, and inasmuch as you are protected by the filing of the above claim, Certificates of Overassessment for the years 1926 and 1927 will be issued in due time.

The statement of the year "1926" in the second paragraph of the above-quoted letter was an inadvertent typographical error. The correct year, and the one which the Commissioner intended to state, was 1927. The revenue agent's examination and his report which had been received by the Income Tax Unit, as referred to in the last sentence of this paragraph, covered the years 1924 to 1927, inclusive, and such report showed a total overassessment of $3,804.36 as stated in the Commissioner's letter. This total overassessment consisted of overassessments of $2,948.33 for 1926 and $856.03 for 1927, no deficiency or overassessment being shown for 1924 or 1925. The "related taxpayers' cases" referred to in the above-quoted letter of the Commissioner were the cases of Drawoh, Inc., Sredies, Inc., and Rehtam, Inc. v. Commissioner of Internal Revenue and Seth Seiders, personally, v. Commissioner, then pending before the Board of Tax Appeals.

Thereafter, on September 5, 1930, the Commissioner wrote the plaintiff as follows with reference to his taxes for 1926 and 1927:

> Reference is made to a recent visit to this office by Mr. Charles T. Wood, in your behalf, requesting information as to the closing of your income-tax case for the years 1926 and 1927 and advice as to the approximate date certificates of overassessment for these years may be expected.
>
> Inasmuch as there is no power of attorney on file in the Bureau authorizing Mr. Wood to represent you in income-tax matters, the result of his visit is communicated to you directly.
>
> You are advised that this office has given careful consideration to the request for an expeditious closing of your case for the years 1926 and 1927. Due to the fact that other related cases are required to be closed under the existing regulations before Certificates of Overassessment can be issued in your case, further action will be deferred pending settlement of these related cases, which are expected to be acted upon in the near future.

4. July 18, 1933, the United States Board of Tax Appeals promulgated its opinion in the consolidated appeals of Drawoh, Inc., Sredies, Inc., and Rehtam, Inc., v. Commissioner of Internal Revenue for 1926 and 1927. This opinion of the Board is reported in 28 B. T. A. 666.

5. June 16, 1934, the Commissioner wrote plaintiff as follows:

> This office is in receipt of a letter from Young & Hughes, 70 Pine Street, New York, New York, dated June 7, 1934, transmitting a letter addressed to them by you dated June 5, 1934, relative to your claim for refund of $3,050.83 income tax for the year 1926.
>
> You are advised that although a decision was rendered by the United States Board of Tax Appeals in the case of Seth Seiders, Ltd., to which your case is related, an appeal has been taken to the Circuit Court and an offer in compromise is also under consideration. Until these matters are settled, the certificate of overassessment which has been prepared in your favor cannot be issued.

6. Appeals to the Circuit Court of Appeals for the Seventh Circuit from the decision of the Board of Tax Appeals in

the consolidated cases of Drawoh, Inc., Sredies, Inc., and Rehtam, Inc., v. Commissioner of Internal Revenue, were perfected by all parties, but the corporations involved paid the deficiencies adjudicated against them by the Board, and, in addition, paid compromise amounts of $1,000 each to obtain dismissal of the appeal filed by the Government. As part of these compromises the corporations specifically waived any and all claims which they might have to refunds or overpayments of taxes for the years involved. Upon acceptance of the compromises, the appeals filed from the decision of the Board of Tax Appeals were dismissed, 74 Fed. (2d) 1012. Claims of the Government for deficiencies and fraud penalties against Seth Seiders personally in connection with his own tax liability and the tax liabilities of the corporations mentioned for 1926 and 1927 were also compromised and dismissed. In making this compromise Seth Seiders specifically waived any right which he might have to the refund of any taxes for the years involved.

7. The corporations, Rehtam, Inc., and Sredies, Inc., paid to plaintiff the amounts of $21,920 which plaintiff returned as income for 1926 and $7,980 which he returned as income in his income-tax return for 1927. These amounts were erroneously returned by plaintiff as his income; although they were paid to plaintiff by the corporations as "salary," they were in reality distributions by the corporations to Seth Seiders and were turned over to Seiders by plaintiff. Prior to the filing by plaintiff of his claim for refund for 1926, as hereinbefore stated, the Commissioner had finally determined that the amounts mentioned paid to him by the corporation and returned by him as income, but later returned to Seth Seiders, constituted distributions by the corporations to Seth Seiders and were, therefore, income to him instead of to plaintiff. The Commissioner so taxed the income to Seth Seiders and this action was affirmed by the Board of Tax Appeals. The corporations of Rehtam, Inc., and Sredies, Inc., also paid to plaintiff in 1927, as "salary and bonus," additional monies specifically ascribed to payment of plaintiff's individual income tax liability upon the aforementioned amounts returned by plaintiff as income. The additional monies received by plaintiff from

the corporations with which to pay the income taxes upon the amounts mentioned were also reported by plaintiff as income in his return for 1927. The tax thereon was paid by plaintiff for that year.

8. After the cases against the corporations mentioned and Seth Seiders with reference to their income tax liabilities and penalties for the years 1926 and 1927 had been finally settled, and the payments on account of the taxes had been made, as hereinbefore stated, the Commissioner on May 16, 1935, declined and refused to refund to plaintiff any amount in respect of the taxes paid by him for 1926 and 1927 on account of income which had been reported by plaintiff which belonged and was returned to Seth Seiders, and advised plaintiff on that date as follows:

> Reference is made to your claim for refund of income tax, for the year 1926, in the amount of $3,050.83.
>
> The grounds set forth in your claim are as follows:

Net income for 1926 as reported	$43, 045. 80
Deduct: Amount of income claimed to be that of Seth Seiders	29, 920. 00
Corrected taxable income	21, 125. 80
Tax previously assessed and paid	3, 581. 08
Corrected tax assessable	530. 25
Tax claimed to have been overpaid	3, 050. 83

> In the determination of the tax liability of Seth Seiders, Inc., Mather and Company, C. J. Howard, Inc., Sredies, Inc., Rehtam and Company, Drawoh, Inc., and Seth Seiders, personally, the United States Board of Tax Appeals found as a fact, that Rehtam, Inc., and Sredies, Inc., paid the income tax on the additional amounts reported by you, by turning over to you the amounts representing the tax on such additional payments (28 B. T. A. 666 at 674). For this reason it is held that there was no overpayment of income tax for the year 1926 on your part.
>
> For the foregoing reasons, your claim will be disallowed. Official notice of the disallowance of your claim will be issued by registered mail in accordance with Section 1103 (a) of the Revenue Act of 1926.

The claim for refund filed by plaintiff for 1926 was finally rejected by the Commissioner on a schedule signed June 15, 1935. This suit was instituted August 18, 1936.

9. The amount of tax overpaid by plaintiff for 1926 on account of the amount of $21,920 reported by him as his income, but which belonged to and was returned by plaintiff to Seth Seiders and later taxed to Seiders, was $2,948.33. The amount of tax overpaid by plaintiff for 1927 on account of the amount of $7,980 erroneously reported by plaintiff as salary was $856.03.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The facts which are not in dispute show that plaintiff overpaid the taxes due by him for 1926 and 1927 in the amounts stated in finding 9. However, counsel for defendant contend that judgment should not be entered in favor of plaintiff and that the petition should be dismissed for the reason that the money with which plaintiff paid the tax upon the income erroneously reported was furnished him by corporations owned by Seth Seiders. It is, therefore, contended that plaintiff has no equitable right to recover.

Under the facts in this case we are of opinion that this contention is without merit. The amounts of overpayments for 1926 and 1927 which plaintiff here seeks to recover were paid to him by the corporations mentioned in the findings as "salary and bonus," and the amounts so paid were used by plaintiff to pay, in part, the tax due upon the total income reported by him and no portion so paid to and received by plaintiff, to the extent of the overpayments here involved, was ever returned by plaintiff to Seth Seiders or to anyone else. The amount so received by plaintiff in 1927 and used by him as a payment on account of tax due for 1926 was reported and returned by plaintiff as income in the year in which received, and he paid the tax thereon. The fact that the Commissioner, in determining the net income for 1927 of the corporations which paid to plaintiff the amount used by him in paying the tax upon the 1926 income erroneously

reported, denied the corporations a deduction on account of the amount of such payment to plaintiff is not a bar to plaintiff's right to recover the excess tax paid. Plaintiff was the taxpayer within the meaning of section 284 (a) of the Revenue Act of 1926 (44 Stat. 9) and is the proper party to claim and receive the return of the overpayments made by him. This section provides that "where there has been an overpayment * * * the amount of such overpayment shall * * * be immediately refunded to the taxpayer." Cf. *Old Colony Trust Co. et al.* v. *Commissioner of Internal Revenue*, 279 U. S. 716; *United States* v. *Jefferson Electric Manufacturing Co.*, 291 U. S. 386; *Builders' Club of Chicago* v. *United States*, 83 C. Cls. 556, 559.

The right of plaintiff to receive the return of the excess tax paid by him does not depend upon whether the corporation from which he received the amount with which to pay the tax was permitted to take a deduction from gross income therefor as an ordinary and necessary expense. It is clear that as between plaintiff and such corporation the plaintiff is the owner of the overpayments since the total thereof was unconditionally paid to him as salary and bonus. No one, except plaintiff, would have a right to demand and receive a refund of the overpayments. The fact, if it be a fact, that the corporations might not have paid plaintiff the amount with which to pay his tax, and which he here seeks to recover, if plaintiff had not been misled into reporting income which belonged to and was ultimately received by Seth Seiders, does not entitle the Government to retain the money. The positive provision of the statute is to the contrary.

Plaintiff filed a timely and proper claim for refund for 1926 and this suit was brought within two years after the rejection of such claim by the Commissioner. He is, therefore, clearly entitled to judgment for the overpayment of $2,948.33 with interest for 1926.

With reference to 1927, it appears that plaintiff did not file a claim for refund and we think it is clear that the letters of the Commissioner of August 20 and September 5, 1930, did not constitute an account stated. These letters fail to disclose a definite statement by the Commissioner of

any specific amount finally determined by him as an overpayment. The most that the Commissioner did was to refer to a report of a revenue agent recommending overassessments for 1926 and 1927 in amounts which are now found to have been correct. But the Commissioner, at the same time, stated that he had taken no action on this report and did not intend to do so until certain related cases had been finally disposed of. An account stated cannot be predicated upon implication and conjecture. It must be a positive and definite statement of a balance due. Any refund in respect of the overpayment for 1927 was, therefore, barred at the time this suit was instituted.

Judgment will be entered in favor of plaintiff for $2,948.33 with interest as provided by law. It is so ordered.

WHALEY, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice,* concur.

WILLIAMS, *Judge,* took no part in this decision.

PARK HOLLAND v. THE UNITED STATES

[No. 43503. Decided March 6, 1939]

On the Proofs

Extra pay for aviation duty, Army.—An Army officer, who, by reason of an airplane accident, was physically unfit for duty as an airplane pilot, but was assigned to duty as an observer and participated as such in aerial flights, is entitled to the 50 percent additional flying pay provided by statute.

Same.—"Nonpiloting duty" is not the equivalent of "nonflying duty."

Same.—Assignment to duty determines an officer's pay status.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell & Ansell* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. The pay period involved in this suit is from July 1, 1935, to June 30, 1936. In July 1935, plaintiff was a first

lieutenant, Air Service, Regular Army, and from the first of August 1935 to the end of June 1936, was a captain in the same service.

2. The plaintiff entered the Army June 1, 1918, in the then Aviation Section, Signal Enlisted Reserve Corps, afterwards the Air Service. On December 10, 1921, by personnel orders No. 261, having qualified, he was rated Airplane Pilot under the provisions of Paragraph 1584½, Army Regulations.

Having been injured in an airplane crash plaintiff was on February 26, 1923, found physically unfit for piloting duty, but fit for duty as an observer, and he was shortly thereafter detailed to flying duty as an observer only.

3. On December 31, 1925, personnel orders No. 306 were issued. Section 6 thereof related to plaintiff and was as follows:

> 6. Pursuant to General Orders 30 and 46, War Department, 1922, each of the following Air Service officers, an aircraft pilot who is unfit for piloting duties but is fit and desired for other flying duty, is detailed to duty involving flying, other than as a pilot, effective January 1, 1926.
>
> This detail to duty involving flying requires participation in one or more of the following: Routine test flights and test flights of new or overhauled aircraft or their power plants, instruments, equipment, or accessories; experimental development of aircraft or parts of aircraft for experimental development of aviation instruments, equipment, or accessories, training for aircraft gunnery and bombing exercises; administrative or inspection purposes in connection with air work or for expediting the movements of personnel, material, or mail; flights duly authorized for the purpose of cooperation with other Governmental Departments, aerial scouting, reconnaissance, convoy, patrol flights, aerial photography, or training for the performance of any of these duties:
>
> *　　*　　*　　*　　*
>
> 1st Lt. Park Holland
>
> *　　*　　*　　*　　*
>
> All orders issued in conflict with this order are hereby revoked.

Reporter's Statement of the Case

4. On September 30, 1926, by personnel orders No. 229, plaintiff having qualified was rated Airplane Observer, section 2, General Orders No. 19, War Department 1925.

5. During the period July 1, 1935, to June 30, 1936, plaintiff was on duty requiring him to participate regularly and frequently in aerial flights and under orders performed the flights prescribed by the Executive Order of June 27, 1932, for an officer who was a qualified aircraft observer, or a qualified aircraft pilot unfit for piloting duties but fit and desired for other flying duty.

6. On December 2, 1935, plaintiff was advised by The Adjutant General as follows:

> 1. Upon the approved recommendation of the Flying Proficiency Board, you have been placed in Classification 5*a* (2) (*b*), Circular 69, War Department, 1935, which reads as follows:
>
> "Those capable and qualified for nonpiloting duty in the Air Corps. This nonpiloting group will include those deemed qualified for such duties as high command and staffs in the Air Corps, combat duties other than piloting, and senior officers of the engineer group and procurement-supply group of the Air Corps. They will be required to continue their aerial experience and fulfill the legal requirements to draw flying pay."
>
> 2. In this connection, your attention is invited to paragraph 2*a* (4) (*d*), Circular 69, War Department, 1935, which requires you to comply with the provisions of that circular as to minimum number of hours in the air and types of missions as outlined therein.
>
> 3. You are advised that you will be reclassified by the Flying Proficiency Board at the close of the current fiscal year, based upon a careful examination of your flying records for the period in question.
>
> By order of the Secretary of War:

7. For the period of his claim, namely, from July 1, 1935, to June 15, 1936, plaintiff was paid as increased flying pay at the rate of $1,440 per annum, and was refused increased flying pay of 50% as provided in Section 13a of the Act of June 4, 1920, 41 Stat. 759, 768, as amended by the act of July 2, 1926, 44 Stat. 780, 781, under a ruling of the Comptroller General, 15 Comp. Gen. 393, 394–395, to the effect that Personnel Orders No. 306 (Finding 3) declared plaintiff unfit

for piloting duties and therefore classified him as a non-flying officer, whose pay under the act of April 9, 1935, 49 Stat. 120, was restricted to an additional sum of $1,440 per annum.

8. For the month of July 1935 plaintiff received for his flying pay $5 less than 50% of his base pay as increased by longevity. For the period August 1, 1935, to June 15, 1936, plaintiff received for his flying pay $383.75 less than 50% of his base pay as increased by longevity, or a total of $388.75 less than 50% for the period named.

For the period June 16, 1936, to June 30, 1936, plaintiff received for his flying pay 50% of his base pay as increased by longevity.

The court decided that the plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The only question in this case is whether plaintiff, who, by reason of an airplane accident, was physically unfit for duty as an airplane pilot, but who was assigned to duty as an observer and while on such duty participated regularly and frequently in aerial flights, is entitled to the 50% additional flying pay provided by Sec. 13a of the act of June 4, 1920, 41 Stat. 759, 768, as amended by the act of July 2, 1926, 44 Stat. 780, 781.

Plaintiff was rated as a pilot and regularly took part in aerial flights until injured in an airplane accident in 1928, and was paid the additional 50% up to July 1, 1935. On Dec. 2, 1935, plaintiff was advised by The Adjutant General that he had been classified as an officer "capable and qualified for nonpiloting duty in the Air Corps" and that he would be required to continue his "aerial experience and fulfill the legal requirements to draw flying pay." The evidence shows that he flew prior to and during all the period covered by this claim.

The defense offered is that since he was not during the period of this claim an airplane pilot he was therefore classified as a nonflying officer under the act of April 9, 1935, 49 Stat. 120, 124, which contained an appropriation for aviation increased pay, with this proviso: "* * * none

of which shall be available for increased pay for making aerial flights by nonflying officers at a rate in excess of $1,440 per annum, which shall be the legal maximum rate as to such nonflying officers." Plaintiff was paid during the period of this claim at the $1,440 rate.

The question therefore is, What is a nonflying officer within the meaning of the act of 1935?

The findings show that plaintiff was classified as an aerial observer, took a special course in this subject, and made frequent flights as an observer, and the only reason he was not continued as a pilot was because of the injury received in an airplane accident.

Although this provision of the act of 1935 has not heretofore been included as a defense in these cases, the court has previously held that an injured flier was entitled to increased pay while incapacitated by reason of the injuries, his flying detail having remained unrevoked (*Marshall*, 59 C. Cls. 900; *Garrison*, 59 C. Cls. 919; *Lasher*, 73 C. Cls. 699); that a warrant officer was entitled to the pay when assigned to the duty of aero repair which required him to fly frequently (*Bradshaw*, 62 C. Cls. 638); that an officer assigned as an "aeronautical officer" of a department was entitled to the pay (*Emmons*, 63 C. Cls. 121); that a medical officer assigned as flight surgeon was entitled to it (*Johnson*, 67 C. Cls. 318); another medical officer was entitled thereto, even though he did not actually participate in such flights (*Brown*, 68 C. Cls. 734); and that an officer detailed to observe bomb tests was also entitled to the pay (*Stribling*, 68 C. Cls. 213).

The leading case is *Luskey*, 56 C. Cls. 411; 262 U. S. 62. See also *Lynch*, 63 C. Cls. 91; *Carleton*, 64 C. Cls. 564; and *Arnold*, 65 C. Cls. 43.

This case is very similar to the *Marshall case* (*supra*), in which case the officer was physically incapacitated by reason of an airplane accident. The court decided that his flying assignment was unrevoked, that he was entitled to pay, and referring to the *Luskey case*, *supra*, said:

> There is no room in the opinion of the Supreme Court for a technical argument that one injured in the aviation service is to be denied his additional allowance because his injuries preclude his actual flying day by day [p. 903].

And in *Bradshaw* (*supra*) in referring to the statute here involved the court said:

> It is fair to assume that Congress intended by the use of the terms "officers and enlisted men" to include all persons in the service of the Army whose duty might require frequent and regular participation in aerial flights [p. 644].

In *Clark* v. *United States*, 60 C. Cls. 589, 591, the court said:

> When an officer is on duty requiring him to participate regularly and frequently in aerial flights he is entitled to the pay provided for in the statute during the time he is on such duty from the day he is placed on such duty until he is detached therefrom.

Johnson v. *United States* (*supra*) is similar to the instant case, in that the officer was not a pilot but a medical officer who was detailed on flying status to observe the physical condition of pilots while flying, the court saying:

> The service was of a dangerous character, inasmuch as he took the chances of the inefficiency of the man whose condition he was undertaking to ascertain [p. 322].

The defendant's argument, consisting mainly of the decision of the Comptroller General, is that because plaintiff was no longer rated as a pilot he was therefore a nonflying officer. This seems to be in direct conflict with the decided cases which hold that the assignment to duty is the thing which determines his pay status. Since plaintiff was assigned to duty as an airplane observer who "frequently and regularly" took part in airplane flights, he would seem to come within the general terms of the statute authorizing the 50% additional pay.

It is absurd to argue that "nonpiloting duty" to which plaintiff was assigned is the equivalent of "nonflying" duty. Plaintiff should recover. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WILLIAMS, *Judge*, took no part in this decision.

EDWARD E. GILLEN COMPANY, A WISCONSIN CORPORATION, v. THE UNITED STATES

[No. 43519. Decided March 6, 1939]

On the Proofs

Government contract; loss incurred by failure to acquire title to site.—Where contractor could not meet the requirements of the specifications within the time limit fixed for performance because the Government did not possess title to sufficient lands to enable it to be done, causing the contractor to incur a loss it was not under obligation to incur, it is held that the contractor is entitled to recover.

Same.—Failure on the part of the Government to make available to a contractor the site upon which the work is to be performed, if it occasions delay in performance and causes damages to the contractor, entitles him to recover his loss.

Same; determination of claim by department officials.—Determination of a claim by department officials is not binding upon the Court but is a fact, a proceeding in the course of the administration of the transaction, to be given such weight as the Court thinks it is entitled to receive.

Same; intention of Government.—It cannot be inferred from the record that the Government intended to make the performance of the work extremely costly when a more inexpensive way was available.

The Reporter's statement of the case:

Messrs. James D. Shaw and *Van B. Wake* for the plaintiff. *Messrs. William H. Donovan* and *Arthur J. Phelan* were on the briefs.

Mr. Henry Fischer, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. P. M. Cox* was on the brief.

The court made special findings of fact as follows:

1. At all times mentioned herein the plaintiff was, and still is, a corporation organized and existing under the laws of the State of Wisconsin and having its principal office at 626 East Wisconsin Avenue, Milwaukee, Wisconsin,

and at all of said times was engaged as a contractor in the construction of marine works of improvement, foundations, and like heavy structures.

2. On October 25, 1932, the defendant instituted condemnation proceedings in the United States District Court for the District of Minnesota, against the Chicago, Milwaukee, St. Paul and Pacific Railroad Company for the acquisition of title to two tracts of land bordering on the Mississippi River near Minneiska, Minnesota, the same consisting of one tract of approximately 1.30 acres and a second tract of 0.65 acre.

The condemnation proceedings bore the following title:

> IN THE MATTER OF THE CONDEMNATION OF CERTAIN LANDS SITUATED ALONG THE MISSISSIPPI RIVER IN THE COUNTY OF WINONA, STATE OF MINNESOTA, WHICH LAND IS NECESSARY, DESIRABLE, AND ADVANTAGEOUS TO THE CONSTRUCTION, MAINTENANCE, AND OPERATION OF LOCK NO. 5, REQUIRED FOR THE IMPROVEMENT OF NAVIGATION IN THE MISSISSIPPI RIVER.

Article 4 thereof included the following:

> That said described lands are the site of said lock, and it is necessary to erect structures thereon, and that the construction of said lock is about to be commenced by your Petitioner's Secretary of War * * * the said Secretary of War has also requested and does hereby make application for the right to take immediate possession of said lands in order that he may expeditiously proceed with said public work and that it is necessary and urgent and for the advantage and best interests of your Petitioner that the said Secretary of War be granted immediate possession of said lands for such purposes.

A certified copy of the condemnation petition, plaintiff's exhibit 17, is by reference made a part of this finding.

The two tracts of land forming the basis of the condemnation proceedings are indicated in red and blue, respectively, on a map entitled "Mississippi River Lock and Dam No. 5," which is plaintiff's exhibit 2 and is by reference made a part of this finding.

These tracts of land were defined in the condemnation proceedings as follows:

Tract No. Wi-1

> That portion of Government Lot 3, Section 17, Township 108 North, Range 8 West of the 5th Principal Meridian, described as follows: beginning at a point on the west line of said lot, 1,373 feet, more or less, north of the southwest corner thereof; said point being 35 feet riverward of, measured perpendicularly to the center line of the riverward track of the Chicago, Milwaukee, St. Paul and Pacific Railroad as now located; thence southeasterly along a line 35 feet riverward of and parallel to the center line of the riverward track of said railroad, 1,737 feet; thence at right angles to said track to the Mississippi River; thence northwesterly along the Mississippi River to the west line of said lot; thence south along the west line of said lot to the point of beginning, containing 1.30 acres, more or less.
>
> * * * * *

Tract No. Wi-2

> That portion of Government Lot 4, Section 17, Township 108 North, Range 8 West of the 5th Principal Meridian, described as follows: beginning at a point on the east line of said lot, 1,373 feet, more or less, north of the southeast corner thereof; said point being 35 feet riverward of, measured perpendicularly to the center line of the riverward track of the Chicago, Milwaukee, St. Paul and Pacific Railroad as now located; thence northwesterly along a line 35 feet riverward of and parallel to the center line of the riverward track of said railroad, 613 feet; thence at right angles to said track to the Mississippi River; thence southeasterly along the Mississippi River to the east line of said lot; thence south along the east line of said lot to the point of beginning, containing 0.65 acres, more or less.

3. Two days later, on October 27, 1932, the Government issued an invitation for bids for the construction of Lock No. 5, which bids were subsequently closed on November 29, 1932. The invitation for bids included the following:

> * * * It is expected that bidders will visit the site and acquaint themselves with all available information concerning the nature of the materials that will be en-

> countered in the river bed, the depths to which it may be necessary to excavate in order to secure satisfactory foundations, the possibility that the river bed or banks will change from natural causes prior to or after commencement of the work, and the local conditions having a bearing on transportation facilities and handling and storage of materials. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of assuming all responsibility for estimating the difficulties and costs of successfully performing the complete work as required.

4. The General Specifications included the following statements under the paragraph entitled *Physical data:*

> (a) The locality of the work provided for herein is subject to atmospheric temperatures as low as minus 40° F. and the normal period of ice formation on the surface of the river is from November to April.
>
> * * * * *
>
> (c) Railway connection immediately at the lock is afforded by the Chicago, Milwaukee and St. Paul R. R. Water transportation is also available during the navigation season (April 10 to November 10) from all points on the Inland Waterway System. An improved highway is in close proximity to the site.

The specifications included the following under paragraph 18, *Grounds:*

> All land at the site below the elevation of ordinary high water (estimated to be Elev. 653.2) is held subservient to the control of the United States for navigation and may be utilized by the contractor as an agent of the United States. The contractor will be solely responsible for obtaining any additional land which he considers necessary for construction purposes and/or the delivery and storage of materials. * * *

5. The defendant had sought by negotiation to secure the lands described in the condemnation petition.

The defendant omitted reference to its lack of title or the pendency of the condemnation proceedings in its request for bids and in the specifications, because it anticipated the lands would be acquired by the defendant before work was ordered to proceed.

6. The first operation essential for the construction of the lock, under the specifications, was the erection of a three-sided temporary cofferdam on the western shore of the Mississippi River at the lock site. The fourth arm of the cofferdam was to be the shore of the river. The height of the cofferdam was specified as 10 feet above elevation 647, elevation 647 being approximately 1.6 feet above extreme low water of 1931. The cofferdam, therefore, had to extend into the river banks to an elevation of 657, which was approximately 4 feet above ordinary high-water mark (653.2) and 11.6 feet above low-water mark (645.4).

The location of the cofferdam and the points at which the same was to be built into the river bank were specified and shown on the plans.

After the erection of the cofferdam the area contained therein was to be dewatered after which operation the pile foundation and the lock itself could be constructed in the dry. This included substantially all the concrete work.

The upper and lower extremity of the guide walls of the lock, not located within the confines of the cofferdam, were to be constructed in the river. The foundations therefor were to be timber cribs fortified with crushed stone or riprap and concrete.

The specifications and plans also called for the construction of an esplanade or earth fill of approximately 15,000 cubic yards between the inner guide wall and the river bank, this fill to go to an elevation of 665.

7. The map, plaintiff's exhibit 2, previously made a part of finding 2 by reference, is a composite map made from two of the drawings forming a part of the specifications. This map shows the details of the lock construction, its location relative to the river bank and railroad property, the three-sided cofferdam, the esplanade or fill, and the location of the guide walls. The cofferdam, as indicated on this map in green, is the one which was subsequently constructed by plaintiff, the actual construction thereof deviating slightly at the north or upstream end of the cofferdam from the original specified cofferdam which is indicated on this map by the parallel dotted lines.

A set of progress photographs, defendant's exhibits D-1, 3-A to 3-O, inclusive, which are by reference made a part of this finding, is illustrative of the cofferdam, the lock, and the esplanade as subsequently constructed for the Government by the plaintiff.

8. On December 6, 1932, plaintiff was called to a conference with the district engineer, Colonel Willing, relative to the qualifications of plaintiff to do the proposed work, plaintiff having submitted a bid supported by a bond on or prior to November 29, 1932.

At this conference plaintiff for the first time learned that defendant did not have title to the site and that condemnation proceedings were pending. It was requested by the defendant that plaintiff secure permission from the railroad company for the use of the necessary land. This was done and the railroad company at first indicated that it would give a qualified consent to enter upon its property.

On December 8, 1932, the railroad company withdrew such permission and on December 12, 1932, the district engineer, Colonel Willing, was notified by plaintiff that such permission had been withdrawn.

9. On or about December 19, 1932, plaintiff by its president, and the United States, by Colonel Wildurr Willing, entered into a contract whereby, in consideration of the sum of $783,528.17, plaintiff agreed, among other things to furnish all labor and materials and to perform all work required for the construction of Lock No. 5 and the upper gateway of an auxiliary lock, including all masonry, metal work, and other work, in strict accordance with the drawings, schedules, and specifications. The drawings, schedules, and specifications were made a part of the contract. The contract and specifications, plaintiff's exhibit 1, are by reference made a part of this finding.

The sum of $783,528.17 was based upon certain estimated quantities and unit prices stated in a schedule "A" which was attached to and formed part of the contract, the contract stating "the actual contract price to be determined by actual quantities."

The contract required the work to be completed within 365 days after the notice to proceed.

10. On January 6, 1933, the defendant through its district engineer, Colonel Willing, formally notified the plaintiff in writing to proceed with the work.

This was the first notice or intimation which plaintiff received that the work would be required to proceed before the defendant acquired the right of access to the site.

11. Plaintiff at once formally requested the Chicago, Milwaukee, St. Paul and Pacific Railroad Company to put in a sidetrack or spur.

On January 10, 1933, in response to this request the railroad company denied the request for a spur track, and refused plaintiff access to any land above the low-water mark of 645 feet elevation.

This refusal was in a letter to plaintiff signed by J. T. Gillick, vice-president of the railroad, a copy of which, plaintiff's exhibit 4, is by reference made a part of this finding.

12. On plaintiff's receipt of the communication of the railroad company dated January 10, 1933, the company promptly informed the contracting officer that it was forbidden by the railroad company to enter upon any shore lands above low-water mark.

At conferences on January 16, 1933, and again on March 15, 1933, at the office of Colonel Willing, the plaintiff requested the contracting officer to either (1) secure for the plaintiff access to the lands specified as the location of the north and south wings of the cofferdam and the site of the esplanade, (2) postpone the date for the commencement of the work until access could be afforded to such fixed and specified location, or (3) change the specifications relating to the cofferdam so as to provide an additional wall and avoid entry above low-water mark. The contracting officer rejected all such requests and directed the plaintiff to proceed with the work.

Plaintiff also communicated with the contracting officer in regard to this matter by a letter dated February 15, 1933, a copy of which, plaintiff's exhibit 6, is by reference made part of this finding.

This letter which sought directions from the contracting officer was replied to under date of February 24, 1933, as follows:

EDWARD E. GILLEN CO.,
Milwaukee Gas Light Company Bldg.,
Milwaukee, Wis.,

Re: Contract Lock No. 5, Mississippi River

GENTLEMEN: I have your letter of February 15, 1933, relative to your failure to obtain permission from the Chicago, Milwaukee, St. Paul & Pacific Railroad Company to use any part of its property for construction purposes, including cofferdam seal. Such action on the part of the Railroad Company is regrettable, but need not prevent you from constructing your cofferdam in such manner as to avoid encroachment on railroad property.

Paragraph 18 of the specifications covers the situation so far as the United States is concerned.

Very truly yours,
(s) WILDURR WILLING,
Colonel, Corps of Engineers,
District Engineer.

(NOTE.—Paragraph 18 of the specifications is quoted in full in finding 4.)

13. Plaintiff continued negotiations with the railroad company, and under date of March 17, 1933, 69 days after the order to proceed with the work had been given, obtained a license from them to use the railroad property solely for the storage of material and supplies and for the purpose of constructing the temporary cofferdam.

Within a few days from the granting of this license plaintiff proceeded to get its floating equipment to the location and proceeded with the construction of the cofferdam.

14. Under date of June 20th plaintiff wrote to the contracting officer calling attention to the fact that it had no authority under the license of the railroad company to place any permanent structure above elevation 645, and requested direction as to whether or not it should enter upon lands above the low-water mark of elevation 645 upon the responsibility of the United States.

By a letter to the plaintiff under date of June 23d plaintiff was informed by the contracting officer as follows:

* * * * *

> It is not my intention at this time to order the construction of the upper guide wall or any permanent structure above elevation 645 under the contract, but to direct you, under the provisions of paragraph 13 of the specifications, to so carry on the work at this time as to avoid construction on the upper guide wall which would encroach above this elevation.
>
> I am taking action in the matter of seeking to obtain immediate possession of the lock site, which I hope will be successful in a short time. I shall advise you further in this matter in the near future.

On August 1, 1933, plaintiff was advised by a telegram from the contracting officer that the lands at the lock site had been acquired by the condemnation proceedings.

15. The contract required the work to be completed within 365 days after receipt of notice to proceed.

With the exception of a few minor change orders not herein involved and notwithstanding the plaintiff's several requests for additional time, the defendant through its district engineer insisted both orally and in writing that the work be completed within the original period. Copies of letters to this effect from the district engineer to plaintiff, plaintiff's exhibits 7, 10, and 13, are by reference made a part of this finding.

The plaintiff had originally planned to erect the cofferdam riverward from the shore by means of trestles. Due to the 69 days' delay in acquiring access to the site (January 6, 1933–March 17, 1933) and the consequent seasonal change in the condition of the river, plaintiff found it necessary to use a more expensive floating plant rather than land equipment, and also to entirely change its schedule of operations, purchase additional equipment including additional concrete forms, adopt more intense methods of construction, and to force the work by putting the same on a twenty-four-hour basis.

The economical sequence of operations was disrupted and much of the work of casting concrete was thrown into the winter period when heating was required.

Due to the 69-day delay plaintiff incurred certain increased costs.

16. The various items involved in the increased costs to plaintiff are tabulated as follows:

Item 1:

Traveling and other incidental expenses and attorney's fees paid and incurred by the contractor in its successful effort to reduce the damage imposed by the delay in obtaining access to the site.

Item 2:

Job organization expense lost to the contractor's use by reason of intervention of indefinite delay.

Item 3:

Excess cost of transportation of equipment caused by necessary change of plan of procedure as a result of the delay.

Item 4:

Additional costs of cofferdam construction occasioned by high water which would not have been encountered in a normal schedule of operations following seasonable delivery of the site.

Item 5:

Excess cost of placing fill for esplanade due to the delay depriving the contractor of the normal economy of furnishing such fill concurrently with excavation and as a part of a single operation.

Item 6:

Increased cost to the contractor of handling materials for the job due to limitation of storage area imposed by the delay in use of the site up to elevation 653.2.

Item 7:

Increased cost of constructing upper guide wall due to the delay in obtaining access to the site.

Item 7A:

Added cost of placing derrick stone resulting from delay in securing site.

Item 8:

Increased cost of building concrete structures because of the adverse weather conditions encountered as the result of delay in delivery of the site above normal costs which the contractor would have otherwise attained.

Item 8A:

Excess labor, only, on general conditions, plant, setting forms, mixing and placing concrete.

Item 8B:

Excess cost resulting from increase in plant required on the job as a result of increased production methods.

Item 8C:

Cost of additional coal resulting from increased plant requirements and cold weather protection.

Item 8D:

Cost of additional wood form material resulting from increased wood forming required as a result of not being able to use Blaw-Knox 100%.

Item 8E:

Cost of additional wood form material resulting from inability to obtain normal re-use of wood form panels, on wood forming originally contemplated, as a result of increased production.

Item 8F:

Cost of additional labor for building wood panel forms described in D and E.

Item 8G:

Cost due to additional material and equipment required for cold weather concrete protection.

Item 9:

Excess cost of pulling of cofferdam due to delay which threw the pulling operation into a period of high water—April 4–13, 1934.

17. The substantial completion of the work was accepted by the district engineer on March 7, 1934, approximately 355 days from March 17, 1933, the date upon which plaintiff

first obtained permission from the railroad company for limited entry upon its property.

Some deductions for liquidated damages were made from the amounts paid to plaintiff, but subsequently all liquidated damages were remitted and are not herein involved.

18. Article 15 of the contract is as follows:

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Under date of August 16, 1933, the plaintiff wrote to the district engineer calling attention to the low water conditions encountered at that time which would cause delay and requested an investigation of the causes of delay.

On September 2, 1933, the district engineer replied thereto stating:

> * * * I therefore find that such delay as the progress of your work has suffered due to shortage of sand and gravel on the job cannot be charged to unforeseeable causes beyond your control, as contemplated by Article 9 of your contract.
>
> You are advised that you may appeal from this finding to the Chief of Engineers within thirty days, as provided by Article 9 of the contract.

On or about September 7, 1933, the plaintiff appealed to the Chief of Engineers of the War Department from the above ruling of the district engineer.

Under date of November 6, 1933, the acting chief of engineers, Brigadier General G. B. Pillsbury, replied to the appeal in writing, which reply included the following:

> * * * You stated that you were delayed in the prosecution of the work due to the fact that the Government was without title to portions of the land essential for

the construction of the specified cofferdam and certain of the permanent structures, and that you were also delayed due to unprecedented drought resulting in low stages of water in the Mississippi River between the site of the work and Wabash, Minnesota.

I find, with regard to your first statement, that the proper prosecution of the work prior to July 31, 1933, did not require the use of the property above elevation 645.4 and consequently delay in progress of the work under Article 9 of the contract could not, due to such lack of possession, be considered an act of the Government in delay in your work.

Copies of the appeals and letters above enumerated, plaintiff's exhibits 12, 20, 21, and 22, are by reference made a part of this finding.

19. Under date of January 6, 1934, plaintiff made a request upon the district engineer for an extension of time to complete its work under the contract, again calling attention to the delay and added expense caused by the lack of title to the portions of the lock site.

This request was refused by the district engineer in a letter to plaintiff dated January 9, 1934.

Pursuant to such refusal plaintiff appealed in writing under date of January 18, 1934, to the Chief of Engineers.

Copies of the three communications herein referred to, plaintiff's exhibits 13, 25, and 26, are by reference made a part of this finding.

20. Under date of March 1, 1934, a communication was addressed to plaintiff by the Chief of Engineers of the War Department reading in part as follows:

> * * * It is desired that you submit evidence of the actual delay during the period from January 6, 1933, to March 17, 1933. This evidence should show whether you made attempt to perform any work, and the reason you were unable to perform it. * * *

In response to this letter plaintiff furnished the Chief of Engineers with a detailed statement of the events associated with the period of January 6, 1933, to March 17, 1933, and its efforts to obtain access to that portion of the lock site owned by the railroad company.

Under date of March 26, 1934, the acting chief of engineers of the War Department sent a communication to plaintiff reading in part as follows:

> * * * After a careful review and reconsideration of all the facts and circumstances in the case, I find that the delay from January 6, 1933, upon which date you received notice to proceed with the work, to March 17, 1933, when you obtained full possession of the site, was a delay of the Government for which you should not be chargeable under the contract. Paragraph 3 of my letter of November 6, 1933, is modified accordingly.

(NOTE.—The paragraph 3 herein referred to is the second paragraph in the last quotation contained in finding 18.)

Copies of these communications, plaintiff's exhibits 14, 27, and 28, are by reference made a part of this finding.

21. Plaintiff proceeded to prepare and submitted a claim to the War Department for additional compensation and a waiver of penalty for delay in the completion of its contract.

In connection with this claim and under date of October 13, 1934, a communication from the War Department, signed by Harry H. Woodring, Acting Secretary of War, was sent to plaintiff.

This communication read in part as follows:

> * * * On the claim as now presented, the Chief of Engineers finds that any reasonable and proper items of additional costs actually incurred by you due to said delay between January 6 and March 17, 1933, are a proper charge against the United States; * * *
> * * * I have also carefully reviewed the facts presented in the case and the above stated findings by the Chief of Engineers have my full approval.
>
> It is not possible to determine from the facts at hand what items of the additional costs claimed are properly chargeable to the delay from January 6 to March 17, 1933, since the figures presented by you are based on costs alleged to have been incurred during the entire period, January 6 to July 31, 1933. However, if you are willing to settle these claims on the basis of the findings of the Chief of Engineers, outlined above, and will submit an itemized statement of the additional costs directly traceable to and proven by specific evidence to be caused by the delay from January 6 to

> March 17, 1933, the Department will, on receipt thereof, refer the matter to the Comptroller General of the United States for direct settlement, recommending payment of such reasonable and proper items of additional costs and remission of liquidated damages in the total amount of $13,300.00.

A copy of this letter, plaintiff's exhibit 40, is by reference made a part of this finding.

22. Following the ruling of the acting secretary of war referred to in the previous finding, the plaintiff filed with the War Department a revised claim. A copy of such claim and the papers pertaining thereto, plaintiff's exhibits 34, 35, and 43, are by reference made a part of this finding.

Thereafter, and on or about November 22, 1935, the Chief of Engineers of the War Department, after causing an extensive examination and audit by the Department of the plaintiff's books and records, found that plaintiff had suffered certain additional costs which were directly traceable to and were caused by the delay on the part of the Government in making available the site necessary for the construction of Lock No. 5. The findings of the Chief of Engineers contained an itemized summarization of the various items of added costs set forth in finding 16. Such itemization was as follows:

	Item	*Amount*
1.	Traveling and other incidental expenses	$910.55
2.	Job Organization expense	1,028.58
3.	Transportation of equipment by water	4,978.54
4.	Construction of cofferdam during high water	1,443.38
5.	Placing fill in the esplanade	2,238.00
6.	Handling materials in limited storage area	2,120.73
7.	Building guide wall under winter conditions	2,018.44
7–A	Placing derrick stone	558.05
8–A	Labor costs under winter conditions	49,111.36
8–B	Increased plant	10,396.61
8–C	Additional coal supplying winter protection	3,196.98
8–D	Wood forms to supplement Blaw-Knox	7,811.67
8–E	Additional lumber for wood forms	4,425.93
8–F	Labor for constructing additional forms	5,013.92
8–G	Material other than coal for winter protection	7,588.34
9.	Pulling cofferdam during high water	None
	Total	102,841.08

The Chief of Engineers recommended that plaintiff be allowed the amount of $102,841.08 in full settlement of the claim, and the findings and recommendations of the Chief of Engineers were approved by the Acting Secretary of War.

A copy of the findings of the Chief of Engineers, plaintiff's exhibit 46, is by reference made a part of this finding.

23. On May 5, 1936, the Comptroller General rejected the said claim in its entirety and certified that no balance was due plaintiff.

Thereafter on the plaintiff's application to the Comptroller General for a review of said ruling, the Comptroller General again rejected the claim under date of December 21, 1936.

Copies of the rulings of the Comptroller General, plaintiff's exhibits 34 and 35, are by reference made a part of this finding.

24. A comparison of the cost of the items set forth in finding 16 as compared with normal production output and normal cost figures, had the site been fully available on January 6, 1933, satisfactorily shows an increased cost to plaintiff of at least $102,841.08.

25. A just and reasonable compensation for the added costs incurred by plaintiff due to the delay from January 6, 1933, to March 17, 1933, in acquiring access to the site necessary for the construction of Lock No. 5, is the sum of $102,841.08.

Except as herein stated, there has been no action taken upon the claim in issue by the courts or any of the departments of the Government.

The court decided that the plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The Edward E. Gillen Company is a Wisconsin corporation engaged in contracting for the construction of marine works of improvement, foundations, and other similar heavy structures. On October 27, 1932, the defendant by advertisement solicited bids for the construction of Lock 5 on and adjoining the west bank of the Mississippi River near Minneiska, Minnesota.

Plaintiff's bid was accepted and on December 19, 1932, plaintiff and defendant executed the contract involved in this case. The pertinent facts upon which the issues in the case are to be determined are not in dispute. The suit is for the recovery of damages suffered by the plaintiff because of the failure of the defendant to obtain title to certain parcels of shore lands essential for the construction of the lock.

The plaintiff as agreed received $783,528.17 for furnishing all the material and labor for the performance of the contract. When the advertisement for bids was published the plaintiff was not advised and the advertisement did not state that the defendant had on October 25, 1932, instituted in the United States District Court for the District of Minnesota a suit to condemn the lands needed at the site of the work.

Plaintiff first became aware of the condemnation suit on December 6, 1932. Its bid for the contract having been accepted and bond filed, and having qualified under the terms of the advertisement prior to November 29, 1932, plaintiff proceeded to execute the contract at the time being requested by the defendant to secure from the Chicago, Milwaukee, St. Paul and Pacific Railroad, the owners of the lands, permission to enter upon and use the same. The railroad company, defendant in the condemnation suit, at first indicated a qualified consent to plaintiff's request; subsequently it absolutely declined to permit the plaintiff or defendant to enter upon or use the lands.

The particular features of contract construction which exacted the use of the railroad lands provided for in the specifications were, first, the construction of a cofferdam; second, the construction of an esplanade, i. e., an earth fill of approximately 15,000 cubic yards between the inner guide wall and the bank of the river, the fill to extend to an elevation of 665.

The cofferdam was the first thing to be constructed. This was specified as a "three-sided temporary cofferdam on the western shore of the Mississippi River * * *. The fourth arm * * * was to be the shore of the river." The fact is not traversed that according to the specifications the plaintiff could not construct the fourth arm of the cofferdam

without entering upon and utilizing one of the parcels of land to which the defendant did not have title. Finding 6. The esplanade was situate upon railroad land, and the defendant did not acquire title to either parcel until August 1, 1933.

The plaintiff was to complete the work within 365 days after notice to proceed, and notwithstanding the defendant's lack of title to land involved, and the delay in the determination of its condemnation suit, the defendant on January 6, 1933, notified the plaintiff in writing to proceed with the work.

The plaintiff, in view of the situation confronting both parties to the contract, endeavored to have the defendant gain access to the lands for the location of the wings of the cofferdam and the esplanade; to postpone the date for the commencement of the work until access to the lands could be acquired, and finally to change the specifications for the cofferdam so as to avoid the necessity of entering upon the railroad's lands. All requests were officially denied by the District Engineer.

The District Engineer placed his refusal to grant the plaintiff any relief upon specification 18, and plaintiff was therefore under the necessity of proceeding as best it could. Finding 16 itemizes plaintiff's loss. Each item is supported by the record and no testimony appears of record to challenge their accuracy. The plaintiff, however, persisted in its efforts to obtain from the railroad company right to enter upon and use its lands and finally on March 17, 1933, sixty-nine days after the receipt of the order to proceed with the work, obtained a license from the railroad company to use its lands, and approximately 355 days later finished the contract work.

Specification 18 reads as follows:

> GROUNDS.—All land at the site below the elevation of ordinary high water (estimated to be Elev. 653.2) is held subservient to the control of the United States for navigation and may be utilized by the contractor as an agent of the United States. The contractor will be solely responsible for obtaining any additional land which he considers necessary for construction purposes and/or the delivery and storage of materials. The con-

tractor shall, without expense to the United States and at any time during the progress of work when needed for other purposes, promptly vacate and clean up any part of the Government grounds that have been allotted to or have been in use by him, when directed to do so by the contracting officer. The contractor shall keep the buildings and grounds in use by him at the site of the work in a sanitary condition. Suitable extinguishers or fire fighting apparatus shall be provided for ready use in all buildings erected or in use by the contractor on Government ground.

We think the construction adopted by the District Engineer of specification 18 is definitely erroneous, and the mistaken application he made of the same is clearly demonstrable. Manifestly, all land at the site of the work below the high-water mark of the river was subservient to the control of the United States. The river was a navigable stream, and the site of the lock indispensably exacted the utilization of the land described.

In order to construct the lock according to the adopted plans and specifications the defendant required more land than it lawfully controlled, and was seeking through the court to obtain title to the same. We are speaking now of land the defendant needed so the lock could be constructed the way it wanted it done. The plaintiff did not possess the right of eminent domain and obviously did not require in its own name *title* to additional lands. The only land the plaintiff needed was storage space for its equipment and transportation of its materials, etc., to the site of the work. The right the plaintiff wanted to acquire was a permissive one, nothing additional.

What space the plaintiff needed, as noted above, was we think the extent and meaning of so much of the provisions of specification 18 as imposed upon it the obligation for obtaining "any additional land * * * necessary for construction purposes and/or the delivery and storage of materials." The plaintiff's contract provided expressly for furnishing all the materials, equipment, and labor necessary to construct the lock. No provision of the contract obligated it to acquire the fee simple title to any land essential to the construction of the permanent work.

On January 6, 1933, the defendant was not in a position to order the plaintiff to proceed with the work. Defendant relied upon securing title to the lands involved in the condemnation suit before they would actually be needed. In this respect defendant was at fault—first in anticipating the early decision of its litigation and secondly in not resorting at once to the provisions of Section 258a (5), Title 40, United States Code, and taking immediate title and possession of the lands. Why the more prolonged method of acquiring title and possession was adopted is not explained.

It is urged in behalf of the defendant that the plaintiff could have proceeded with the work by using the river and transporting by water its materials, equipment, etc., to the site of the work. The plaintiff subsequent to January 6, 1933, was doing the best it could, and while it is impossible to state that the work could not have proceeded from the river side, the record supports a statement that on the date the contract was let neither the defendant nor plaintiff contemplated that course.

We cannot infer from the record that the defendant intended to make the performance of the work extremely costly when a more inexpensive way was available, and this fact is confirmed by paragraphs (a) and (c) of the general specifications, which we quote:

> (a) The locality of the work provided for herein is subject to atmospheric temperatures as low as minus 40° F. and the normal period of ice formation on the surface of the river is from November to April.
>
> (c) Railway connection immediately at the lock is afforded by the Chicago, Milwaukee and St. Paul R. R. Water transportation is also available during the navigation season (April 10 to November 10) from all points on the Inland Waterway System. An improved highway is in close proximity to the site.

When the defendant disclosed as it did in the specifications quoted the physical data known to it and invited bidders to visit the site and make their own inspection, it pointed out the local conditions existing at the site of the work and by so doing induced bidders to bid accordingly.

Paragraph (c) noted the availability of the railroad. It was not available until a much later date, and the defendant was aware of this fact.

Aside from the fact that the defendant knew the difficulties attending the performance of the work in the winter months and during the high-water season, it is true that irrespective of the means of approach to the shore side of the river the plaintiff could not construct the cofferdam specified without the railroad company's consent, and the esplanade exacted title to a portion of the company's right-of-way.

As late as June 23, 1933, the defendant notified the plaintiff as follows:

> It is not my intention at this time to order the construction of the upper guide wall or any permanent structure above elevation 645 under the contract, but to direct you, under the provisions of paragraph 13 of the specifications, to so carry on the work at this time as to avoid construction on the upper guide wall which would encroach above this elevation.
>
> I am taking action in the matter of seeking to obtain immediate possession of the lock site, which I hope will be successful in a short time. I shall advise you further in this matter in the near future.

When the contract work was completed the plaintiff submitted a claim for the allowance of the extra costs and expenses incurred by reason of the defendant's failure to acquire title to the site until sixty-nine days had elapsed. This claim was finally passed on by the Chief of Engineers and allowed. It was not paid, though approved by the Acting Secretary of War.

The defendant objects to including in the findings the facts stated in Finding 22 on the ground that the officials acting were without jurisdiction to determine a case for unliquidated damages, citing the case of *Snare & Triest Co. v. United States*, 75 C. Cls. 326. We do not cite the determination of the claim as binding upon this court. On the contrary, we award a judgment upon the basis of the present record.

The determination of the officials of the Government having to do with the contract in suit is a fact, a proceeding

in the course of the administration of the transaction, and as part thereof to be considered and given such weight as the court thinks it is entitled to receive. As a matter of fact, the record in the case sustains a judgment for a much larger sum than the officials found due, but inasmuch as the plaintiff claims no more, we think what is claimed is amply supported by the record.

The case of *McCloskey* v. *United States*, 66 C. Cls. 105, differs from the instant one as to some facts. As a precedent it establishes the principle that a failure upon the part of the defendant to make available to a contractor the site upon which the work is to be performed if it occasions delay in performance and causes damages to the contractor entitles him to recover his loss.

It is true that in the *McCloskey case* an independent oral agreement upon the part of the defendant to clear and have the site for the work available by a date sufficient in point of time for the contractor to commence and complete the work according to the provisions of the contract, was established. However, in *Worthington Pump & Mach. Corp.* v. *United States*, 66 C. Cls. 230, 240, the court held as follows:

> True, the Government did not expressly agree to have the pump well ready by any fixed time, but the contract provided that the plaintiff should install the pumps at a fixed date, and it could not do so unless the pump well was ready some time in advance of the date so fixed. There was an implied contract on the part of the Government that the well would be ready, * * *.

The case of *Carroll et al.* v. *United States*, 76 C. Cls. 103, and the following cases, *Snare & Triest* v. *United States*, 43 C. Cls. 364, *Kelly & Kelly* v. *United States*, 31 C. Cls. 361, involve a determination of a legal question similar to the one in suit. We think that from both the standpoint of facts and law the plaintiff is entitled to recover. Plaintiff under its contract was to perform the work in accord with the specifications; no alternative was granted. Plaintiff could not meet the requirements of the specifications within the time limit fixed for performance because the defendant did not possess title to sufficient lands to enable it to be done. On the contrary, the defendant's failure

to make available means for the performance of the work increased its final cost and caused the plaintiff to incur a loss it was not under obligation to incur, and for which we award a judgment.

Plaintiff is awarded a judgment for the sum of $102,-841.08. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge,* concur.

WILLIAMS, *Judge,* took no part in this decision.

A. F. HAMACEK MARINE CORP. v. THE UNITED STATES

[No. K-185. Decided March 6, 1939. Plaintiff's motion for new trial overruled May 29, 1939]

On the Proofs

Patent for improvement in "Ships".—It is held in the instant case the facts show that if the claims of the patent are so construed as to read upon the alleged infringement structures, they are clearly anticipated by the prior art.

Same; lack of proper description.—The patent is held to be void through lack of proper description.

The Reporter's statement of the case.

Mr. Harry C. Bierman for the plaintiff. *Mr. Hyman M. Goldstein* was on the brief.

Mr. Alexander Holtzoff, with whom was *Mr. Assistant Attorney General Sam E. Whitaker,* for the defendant. *Mr. C. Hugh Duffy* was on the brief.

Plaintiff seeks to recover $8,210,000 for alleged infringement of a patent granted to Adolph F. Hamacek for an improvement in "Ships." The patent is directed to the construction of a ship hull and the novel feature is claimed to consist of concave longitudinal channels in the aft underbody portion of the hull.

Plaintiff contends that certain naval vessels constructed by the United States infringe the patent. On the other hand the defendant denies that the ships of the class mentioned by plaintiff, or any ships constructed by the United States, embody the hull formation described and claimed in the patent. The defendant further contends that the patent is invalid in that the structure described and claimed therein is anticipated by the prior art; that the patent is void for the reason that it does not contain a sufficient description as required by R. S. 4888 (U. S. Code, Tit. 35, Sec. 33), and that the patent is inoperative and invalid for the reason that the structure described and claimed therein does not perform the functions for which it was intended and in respect to which patent was issued.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff is the sole and exclusive owner of the U. S. patent in suit, No. 1405684 issued February 7, 1922, to Adolph F. Hamacek for an improvement in "Ships", having acquired the same from the patentee by virtue of assignments duly recorded in the United States Patent Office.

2. The patent application which matured into the patent in suit was filed in the Patent Office September 27, 1919, and a copy of the file wrapper and contents, showing the procedure in the Patent Office, are in evidence as defendant's exhibit #31 and are by reference made a part of this finding.

3. In the art of ship construction it has been a well-recognized and basic object of marine engineering since its inception and for a period of over one hundred years to so shape the contour of the hull as to provide for a minimum resistance to its movement through the water, thereby contributing to a minimum propulsive effort irrespective of whether this is accomplished by sail or power.

4. It has been well known to those skilled in the art that this feature of design, sometimes referred to as "streamlining," differs greatly in its characteristics as applied to the hulls of various classes and sizes of ships. By way of exemplification the hull of a cargo-carrying ship designed for an economical speed of 16 knots with maximum cargo capacity

would differ materially in contour design from the hull of a speed boat designed for a speed of 35 knots.

5. The patent in suit, a copy of which (plaintiff's exhibit 1), is made a part of this finding by reference, is directed to the contour of a ship's hull and especially to the stern or aft portion thereof.

The patentee, by way of introduction to the statement of the object of his invention, sets forth in his application the following explanation of the progress of a ship through the water:

> * * * The water flowing into the water cavity at the rear possesses substantially the same amount of potential energy that it took to displace an equal volume at the bow, so that if this potential energy is utilized and the formation of a vacuum prevented, the ship will move through the water with little or no resistance, except skin friction. * * *

The patentee states further his object of his patent in the following phraseology:

> * * * The object of my invention is to provide a ship hull having a contour throughout the aft or stern portion thereof, designed and adapted to utilize the potential energy of the water flowing into the water cavity at the rear and also to prevent the formation of a vacuum.

More specifically the alleged invention, as set forth in the specification, comprises an upwardly and inwardly extending concave water channel formed on each side of the aft portion of the hull beginning at the midship section adjacent the bilge and extending to the stern. One way in which this may be accomplished is disclosed in the drawings, sheet 1 of which is reproduced herewith, and in which line 13 is indicative of the upward slope of these water channels. The patentee states on page 2, lines 7 to 35, inclusive, with reference to the designing of this channel, as follows:

> * * * *Obviously, then, the greater the draft of the ship and the greater the forward speed thereof, the more gentle must be the upward and inward slope of the portion 12 of the underwater hull. The portion 12 of the hull of the ship is given a gentle upward, side,*

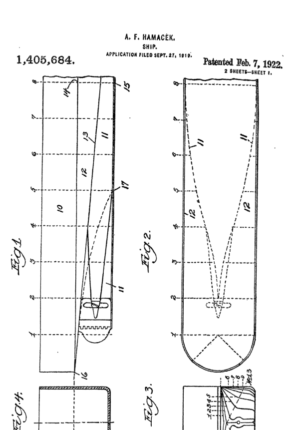
A. F. HAMACEK.

SHIP.

APPLICATION FILED SEPT. 27, 1919.

1,405,684. Patented Feb. 7, 1922.

2 SHEETS—SHEET 1.



> *and inward inclination or slope, dependent upon these conditions, and in this way efficient impact of the inflowing water is obtained thereon.* Owing to the slope thus provided, this impact of the inflowing water is converted into a forward thrust on the aft part of the ship, and thus the energy required to displace the water at the bow of the ship is, in a large part, restored to the ship, and the only energy required for the forward propulsion thereof is that necessary to overcome skin friction and the inevitable efficiency losses in the conversion. The upward slope given to the bottom portion 12 is determined largely, if not entirely, by the slope of the line 13, intersecting between the lower and upper portion of the submerged hull, and with this properly determined as above indicated, a ship may be designed which may be propelled through the water at great speed and comparatively with little resistance. [Italics ours.]

Other than indicated by the above italicized portion of the specification, the patentee does not indicate any rule or direction which might be used by those skilled in the art to apply his form of construction to ships of various classes, speeds, sizes, and drafts, and more specifically just what the side and inward inclination of the water channel should be for various speeds and drafts.

6. All of the claims of the patent in suit are relied upon. Claim 1 is as follows:

> 1. A ship's form in which an upwardly and inwardly extending water channel is formed on each side of the hull from substantially the midship section adjacent the bilge to a point adjacent the stern at both of which points the said channels terminate, said channels having upper and lower surfaces.

The remaining claims add to claim 1 certain specific details of construction. These claims are as follows:

> 2. A form according to claim 1 wherein the upper surfaces of the channels are continued aft under the stern.
>
> 3. A form according to claim 2 wherein the upper surfaces terminate in a flat stern.
>
> 4. A form according to claim 1 wherein the transverse lines of the upper surfaces of the channels are straight and swing gradually from vertical amidships

to approximately horizontal at the stern and the transverse lines of the lower surfaces gradually become straighter and vertical at the stern.

5. A form according to claim 1 wherein the upper surfaces of the water channels meet the freeboard at the water line.

6. A form according to claim 1 wherein the ship's bottom is flat.

7. A ship's form according to claim 1 in which the line of the water channels from the bilge to the stern is designed in accordance with the draft, width, and speed of the vessel.

7. Infringement is charged by two classes of cruisers constructed for and used by the United States Navy, which classes are typified, respectively, by the cruiser *Augusta* and the cruiser *Salt Lake City*. A drawing, plaintiff's exhibit #4, is illustrative of the hull contour lines of the *Augusta* class of cruiser, and a drawing, plaintiff's exhibit #5, is illustrative of the hull contour lines of the *Salt Lake City* class of cruiser. These drawings, which are termed "contract plans," are by reference made a part of this finding.

8. Prior to September 27, 1919, the following printed publications and patents had been published and were available to the public:

British patent to Manker, #21,195 of 1907 (defendant's exhibit #56).

Article by James A. Smith, entitled "The Design and Construction of High Speed Motor Boats" published in Transactions of the Institution of Naval Architects, Vol XLVIII, 1906 (defendant's exhibit #57).

French patent to Marseille, #440,304 of 1912 (defendant's exhibit #58).

"Transactions of The Society of Naval Architects and Marine Engineers," Vol. XXII, published in 1914 (defendant's exhibits #26, 26A, and #26B).

United States patent to Deputy, #11,416, patented August 1, 1854 (defendant's exhibit #27).

"Collections de Plans on Dessins De Naviers," published 1892 (defendant's exhibit #20).

"The Practical Ship Builder," published in 1839 (defendant's exhibit #21).

"A Treatise on Shipbuilding," published 1820 (defendant's exhibit #22).

"Plans of Wooden Vessels," from the year 1840 to 1869. Vol. 2 (defendant's exhibits #25 and #25A).

"Transactions of The Society of Naval Architects and Marine Engineers," Vol. 2, published 1894 (defendant's exhibits #32 and #37).

"Wooden Sailing Vessels" in Transactions of The Society of Naval Architects and Marine Engineers, Vol. XV, published 1907 (defendant's exhibit #38).

The above enumerated exhibits are by reference made a part of this finding.

None of the above prior art publications and patents were cited by the Patent Office during the prosecution of the application which matured into the patent in suit.

9. Prior to 1900 there were constructed for and used by the United States Navy the gunboats U. S. S. *Wilmington* and U. S. S. *Helena*. The blue print, plaintiff's exhibit #3 and #3a, which correctly illustrates the hull structure and contour of these ships, is by reference made a part of this finding.

10. Prior to 1900 there was constructed and used by the United States Navy the torpedo-boat No. 9, U. S. S. *Dahlgren*. The blue print, defendant's exhibit #18, which correctly illustrates the structure of this ship, is by reference made a part of this finding.

11. Prior to 1900 there were constructed for and used by the United States Navy the monitors U. S. S. *Florida* and the U. S. S. *Arkansas*. Defendant's exhibits #23 and #33 are prints of the drawings of these ships which are by reference made a part of this finding.

12. In order to better visualize the various hull contours involved in the present suit and which involve three dimensional characteristics, defendants have prepared and introduced in evidence certain physical models. These models represent in miniature and to scale, as near as the model makers' art permits, the rear portions (aft from the midship section), respectively, of the Hamacek patented construction; the alleged infringing classes of ships typified

by the U. S. S. *Augusta* and the U. S. S. *Salt Lake City;* and the prior art ships U. S. S. *Dahlgren* and the U. S. S. *Helena.*

These models have the location and shape or contour of the hull frame members indicated on them by black lines, each frame or station member being numbered to correspond with the frame members shown on the body plans of these ships from which the models were made. These models are as follows:

Hamacek Patent Form (defendant's exhibit 11).
U. S. S. *Augusta* (defendant's exhibit 13).
U. S. S. *Salt Lake City* (defendant's exhibit 12).
U. S. S. *Helena* (defendant's exhibit 14).
U. S. S. *Dahlgren* (defendant's exhibit 15).

The Hamacek patented model was made from a photostatic enlargement of Figure 3 of the Hamacek patent drawings. The remaining models were reproduced from the body plans of these ships which body plans are in evidence and form a part of findings 7, 9, and 10.

13. The cruisers of the *Augusta* class are provided with short and slight inwardly and upwardly extending concavities in the approximate midsection of their aft underbody. As disclosed in the body plan, plaintiff's exhibit #4 and the model defendant's exhibit #13, the frame members or stations of the aft portion of the hull are convex in character forward of and including frame or station 31. Frames 32, 33, and 34 possess a concavity at their lower portion adjacent the deadwood of the ship. The remaining frames aft including, to-wit, frames 35, 36, 37, et cetera, are all convex in character.

The short concavity or channel extending through the three frames or stations above enumerated, and which is approximately 15 to 20% of the after half-length of the ship, is incidental to the curvature of the frames into the deadwood, the primary purpose of which is for structural strength and facility in dry-docking.

The vessels of this class do not have a ship's hull in which an upwardly and inwardly extending water channel extends from or near the midship section adjacent the bilge to a point adjacent the stern.

The vessels of this class do not have a form wherein the transverse lines of the upper surfaces of the channels are straight and swing gradually from vertical amidships to approximately horizontal at the stern and the transverse lines of the lower surfaces gradually become straighter and vertical at the stern.

14. The cruisers of the *Salt Lake City* class are provided with concavities in their aft underbody. As disclosed in plaintiff's exhibit #5 and the model defendant's exhibit #12, the frame members or stations of the aft portion of the hull forward of station of frame 16 are convex in character; frame 16 is substantially straight in character with the exception of a convex curvature at its upper end where it merges into the knuckle, and frame 16½ is concave in character in its lower portion where the same merges into the deadwood. The succeeding frames from 16 aft show a concavity.

The ships of this class have a concavity or channel beginning some place between frame 16 and 16½ adjacent the deadwood and which extends aft to the stern, which concavity extends inwardly and upwardly. Such concavity covers from 35 to 40 per cent of the after half-length of the ship.

The vessels of this class do not have a ship's hull in which an upwardly and inwardly extending water channel extends from or near the midship section adjacent the bilge to a point adjacent the stern.

The vessels of this class do not have a form wherein the transverse lines of the upper surfaces of the channels are straight and swing gradually from vertical amidships to approximately horizontal at the stern and the transverse lines of the lower surfaces gradually become straighter and vertical at the stern.

15. The hull of the gunboat *Helena* was provided with concavities in its aft underbody. As disclosed in defendant's exhibits #3, #3a, a body plan of the *Helena* and *Wilmington* gunboats Nos. 8 and 9, and the model, defendant's exhibit #14, frame 13 is concave in character, and the succeeding frames aft, 14, 15, 16, 17, 18, 19, 20, and 21 are also concave in character, the concavity being of such form as

to provide an upwardly and inwardly extending concavity or channel which begins at some point between frames 13 and 12 and terminates at the stern of the vessel—this concavity or channel therefore extending approximately 80 to 90% of the after half-length of the ship. This concavity or channel does not start at the bilge but starts adjacent the keel or center line of the ship and is in this respect similar to whatever channel is present in the alleged infringing classes of ships typified by the *Augusta* and the *Salt Lake City*.

The bottom of the *Helena* was flat. The *Helena* had a form or contour in which an upwardly and inwardly extending water channel was formed on each side of the hull from near the midship section to a point adjacent the stern.

16. The publication Transactions of The Society of Naval Architects and Marine Engineers, Vol. II, published in 1894, a copy of which defendant's exhibit #32, is by reference a part of finding 8, contains an article by J. J. Woodward, Naval Constructor, which article contains the body plans of gunboats 8 and 9 which are the body plans of the *Helena* and the *Wilmington*. In connection with the design of the aft portion of the hull the article states on page 289 that—

> * * * the utmost care has been taken to provide for a free flow of water to the screw propellers, and the after body has been freely cut away with this end in view. * * *
>
> * * * In this connection it is proper to call attention to the fact that the peculiar shape of the after body of these vessels is by no means a matter of taste on the part of the designer, but is logically imposed by the considerations just referred to, taken conjointly with the necessity of affording every possible protection from external injury to the screw propellers which can be afforded by the shape of the hull.

17. The hull of the torpedo boat U. S. S. *Dahlgren* was provided with a short inwardly and upwardly extending concavity in the approximate midsection of her aft underbody. As disclosed in the body plans, defendant's exhibit #18 and the model defendant's exhibit #15, the frame aft

from the midlength and including frame 15 are either convex or straight, except for a very short concave portion the frames are connected to the keel or dead-wood.

Frames 16, 17, 18, and 19 are concave in character, and the remaining frames aft to the stern are convex.

The contour lines of the aft underbody of the *Dahlgren* are substantially similar to those of the *Augusta*.

Such concavity as exists begins adjacent the keel and not adjacent the bilge.

18. The hulls of the monitors U. S. S. *Florida* and the U. S. S. *Arkansas* had flat bottoms and were provided with recessed portions or channels in the aft portions of their underbodies. The drawing of the body plans of the U. S. S. *Florida*, defendant's exhibit #23, indicates that the last ten stations or frames of the afterbody are concave in character. Channels formed by this concavity begin near the keel and extend upwardly and inwardly throughout approximately 25% of the total length of the ship or about 50% of the afterbody. The plans of the U. S. S. *Arkansas* disclose channels or concavities substantially similar to those of the U. S. S. *Florida*.

19. British patent to Manker, #21,195 of 1907 (defendant's exhibit #56), discloses a motorboat with a hull contour which is described in the text as one "intended for very high speeds."

The hull is provided on each side with outwardly extending portions referred to as "stability guards," and these, together with the dependent portion of the hull, form a pair of channels on each side of said hull. These channels extend inwardly from a point near the bow to the stern.

When the hull is at rest the forward portions of the stability guards rest on the surface of the water, while the rear portions thereof clear the water. When the hull progresses through the water at a comparatively low speed the bow rises and the stern sinks so that the longitudinal line of the stability guards coincides with the water line. At high speeds the stern settles further and the bow rises. The hull-form as disclosed has a pair of inwardly extending channels which at low speeds are parallel to the water line and at

high speeds assume a *downward* inclination toward the stern.

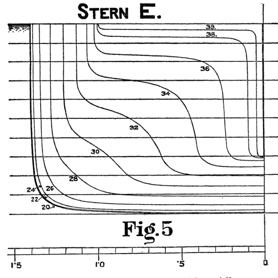
20. An article contained in "Transactions of The Institution of Naval Architects" (defendant's exhibit #57), published in 1906, discloses in Plate XIII the hull construction of a high-speed motorboat of shallow draft referred to as the "Napier." The hull has a shallow bilge forming a pair of channels beginning in the neighborhood of frame 2 at the fore portion near the bow and well forward of the midsection. These channels do not extend to the stern, but, as stated in the description of the boat, terminate about one-fourth of the length of the hull from the stern, leaving flat sections aft of this, the portion of these channels located in the afterbody extending inwardly and upwardly.

21. The French patent to Marseille, #440,304 (defendant's exhibit #58), discloses a fishing boat having a narrow short center downwardly extending portion under water. The connection of this portion with the upper portion of the hull at the bilge line forms a channel along each side of the hull which extends from a point adjacent the bow of the boat and terminates about one-quarter of the length of the vessel from the stern. These channels apparently swing inwardly toward the stern but not upwardly. The vessel has a round bottom.

No translation for the French text has been furnished, and no testimony has been presented as to what the text, taken together with the drawing, conveys to the man skilled in the art.

22. In the publication entitled "Transactions of The Society of Naval Architects and Marine Engineers," Vol. XXII of 1914 (defendant's exhibits #26, #26A, and #26B), there is an article by Naval Constructor D. W. Taylor relating to a series of different forms of afterbodies for ships. The article discusses and contrasts different forms of afterbodies and is illustrated with a series of plans showing the various afterbodies.

One of the afterbodies, the form of which is illustrated and which is designated "Stern E, Fig. 5," is reproduced herewith:



This afterbody is described in the article as follows:

> The stern E was a combination of sterns C and D, the attempt being made to combine them half and half as it were, *and coax the water up along a bilge diagonal.* [Italics ours.]

The stern, as illustrated, discloses an afterbody having upwardly and inwardly extending water channels beginning at frame 28 and extending through to the stern which is flat. These channels begin adjacent the bilge in the neighborhood of station 28 and extend to a point adjacent the stern, the channels having well-defined upper and lower surfaces. The hull also has a flat bottom.

The channel extends substantially from frame 28 to the stern through 35% of the after half-length of the ship or-

about the same proportion as to length as the concavities existing in the after underbodies of the alleged infringing class of cruisers typified by the U. S. S. *Salt Lake City*.

23. For a period of over one hundred years it has been the practice of naval architects to design ships' hulls with flat bottoms and round bottoms and with flat sterns and round sterns, and to provide in the after underbody of the hulls concavities of various extent forming upwardly and inwardly extending water channels on each side of the hull. Such channels are indicated in the prior publications enumerated below as starting at various points in the afterbody of the ship and terminating at a point adjacent the stern. The publication entitled "The Treaties on Shipbuilding" published in 1820 (defendant's exhibit #22), contains several examples of such upwardly and inwardly extending concavities in the after-portion of a ship's hull and extending to the stern. This finding is also based upon disclosures contained in the following publications:

United States patent to Deputy, # 11416 patented August 1, 1854 (defendant's exhibit #27).

"Collection de Plans on Dessins De Naviers," published 1892 (defendant's exhibit #20).

"The Practical Ship Builder," published in 1839 (defendant's exhibit #21).

"Plans of Wooden Vessels," from the year 1840 to 1869 Vol. 2 (defendant's exhibits #25 and #25A).

"Transactions of The Society of Naval Architects and Marine Engineers," Vol. 2, published 1894 (defendant's exhibits #32 and #37).

"Wooden Sailing Vessels," in Transactions of The Society of Naval Architects and Marine Engineers, Vol. XV, published 1907 (defendant's exhibit #38).

24. If the terminology of claim 1 of the patent in suit, upon which the remaining claims in suit are dependent and particularly the phrase therein "from *substantially* the midship section *adjacent* the bilge to a point *adjacent* the stern" [italics ours], is given a sufficiently broad interpretation to apply to the alleged infringing cruisers typified, respectively, by the *Augusta* (finding 13) and the *Salt Lake City* (finding 14) in which the concavities extend through

only a portion of the after-length of the ship, and begin adjacent the keel or deadwood, the terminology of the claims applies with equal facility to the U. S. S. *Helena* and the U. S. S. *Dahlgren* and the Taylor stern or afterbody in which the concavities begin adjacent the bilge as more specifically set forth and illustrated in finding 22, and the claims will be invalid.

25. The patent in suit is not infringed by the classes of United States cruisers typified respectively by the U. S. S. *Augusta* and the U. S. S. *Salt Lake City*.

26. For many years it has been customary for ship designers to predict the performance characteristic of full-sized ships, including such items as resistance, speed, horsepower, and wave profile alongside the vessel, by testing a small-sized model of the hull in what is known as an experimental model basin. Such tests are made in connection with the design of all important government ships.

Such an experimental model basin has been located at the Washington Navy Yard for many years. This basin comprises an inclosed body of water about 420 feet in length, 39 feet wide and a depth of 14 feet in the center, the tank being specially constructed so as to maintain the surface of the water in a quiet condition.

An electrically driven towing carriage spans the basin and is operated on rails located on either side thereof. This carriage is provided with an equipment for towing the model at various speeds and recording accurately the resistance to the towing. The entire apparatus is constructed and operated with precision in order to obtain accurate results. One example of this is that the rails on which the towing carriage travels are not straight, but are given a curvature in the 420-foot length corresponding to the earth's curvature for this distance so that the rails are accurately parallel with the surface of the water.

27. To the results obtained from the towing tests, complicated but more or less standardized, mathematical formulae are applied, which formulae relate to the ratio in dimensions between the model and the full-sized ship which it represents. The results thus obtained are indicative of the horsepower needed to propel the full-sized ship at the

various desired speeds and enable the efficiency and performance of a given proposed hull contour of a full-sized ship to be checked in advance of its actual construction.

In connection with the formulae used, the speed of a full-sized ship is increased in a certain ratio determined by the square root of the linear ratio between the ship and the model; as, for example, a towing speed of 4 knots for a 20-foot model would correspond to approximately a 20-knot speed for a 500-foot ship.

28. In order to ascertain the relative efficiency between the Hamacek form of hull and prior art forms of hulls, the patentee Hamacek conducted certain tests in Chicago, Illinois, in 1920. These comparative tests were conducted on two 20-foot models which Mr. Hamacek, the patentee, designed and constructed or caused to be constructed.

The lines for the model typifying the prior or conventional form of hull were obtained from the publication "Marine Engineering" in the year 1920, and were those of a British merchant ship of about 20,000 gross tons and 16 knot speed designed for combined passenger and freight service.

The lines of the model typifying the patent in suit were taken from Figs. 1, 2, and 3 of the Hamacek patent in suit. Both models were so constructed as to have the same length, width, and draft and to carry the same load.

Two types of tests were conducted as follows:

(a) The models were simultaneously towed in open water from the rear of a motorboat and the relative pull on the tow ropes was measured.

(b) The models were self-propelled by the installation of a power plant comprising a storage battery, an electric motor and a propeller driven by the motor, the same power plant being used interchangeably in the two models.

29. The results obtained from the towing tests are inconclusive as to the relative merits of the two models due to such facts as exposure to the wind; variation in the effect of currents on the two models, the two tow lines being of different lengths; agitation of the water by the propeller of the towing motorboat; waves; and yawing of the models.

The propulsive tests were also inconclusive through the absence of observation of the voltage applied to the motor during the tests, and due to the fact that between the tests of the two models and while the power plant was being exchanged, wind, wave, and current conditions might have changed.

30. It is customary for the Navy Yard Model Basin to test models submitted by the public upon payment of a certain fee.

In 1922 and prior to the filing of the petition in the present case, the Navy Yard, pursuant to this customary procedure and at the request of Mr. Hamacek, submitted the same two models specified in finding 28 to a series of towing tests in the Navy Yard Model Basin. The models were tested at various speeds up to 11 knots, this towing speed representing a speed of over 60 knots for a full-length ship, of which these models were representative, and which speed is far in excess of any speed for any known ships of this size and type.

The observations as to model towing speed and resistance were plotted in the form of curves, and submitted to the A. F. Hamacek Marine Corporation.

A copy of this plot, defendant's exhibit #28, is by reference made a part of this finding.

31. By the use of the standardized computations and formulae referred to in finding 27, the results of the towing tests of the Hamacek models conducted in 1922 at the Washington Navy Yard have been converted into comparative effective horsepower and speed for two 600-foot ships geometrically identical with these two models. These computations have been reduced to two comparative curves shown on a chart, defendant's exhibit #36 which is by reference made a part of this finding.

The results thereon show:

(a) At the 16-knot speed, which is the speed of the prior conventional hull construction as selected and constructed by Mr. Hamacek, the conventional hull would require approximately 6,000 effective horsepower, whereas at the same speed the patented form of the hull construction would require approximately 7,000 horsepower.

(b) At a speed of approximately 22 knots, which corresponds to the speeds of combined passenger and freight steamers such as have been built for the Dollar Line, the Matson Line, and the Panama-Pacific Line, the effective horsepower required for the conventional hull would be about 23,000 horsepower, whereas the effective horsepower of the patented hull would be about 25,000, or almost 10% greater.

It would not be economical to operate a ship of this class (combined cargo and passenger) at a speed in excess of 22 knots, as higher speeds would, as indicated in (c), involve a very large increase in horsepower and cost of operation.

(c) At a speed of 23½ knots the effective horsepower for both the conventional hull and the patented hull would be the same and in the neighborhood of 40,000 effective horsepower.

(d) From speeds of 23½ knots to approximately 31 knots the horsepower required for the patented hull would be less than the horsepower required for the conventional hull at the same speed. At a speed of 27 knots, the patented hull would require 67,000 effective horsepower, and the conventional hull 71,000 effective horsepower.

To maintain these vesesls at a speed of 31 knots would require about 108,000 effective horsepower in each case.

32. In November of 1936, the tests of the two Hamacek models were again made at the Navy Yard Model Basin in the presence of the commissioner and experts representing both plaintiff and defendant.

These tests comprised a repetition of the previous comparative resistance tests made on these models in 1922 (see finding 30) and in addition self-propulsive tests were also made in which the models were propelled by an electric motor and the power input thereto accurately measured at various speeds.

Prior to the tests it was found that both the Hamacek models showed a "hogging" or warping to the extent of approximately three-eighths of an inch. It was also found that both of the models leaked slightly. Certain special tests were made and as a result a corrective leakage factor was obtained and agreed to by the experts of both plaintiff

and defendant, which leakage corrective factor was utilized in the subsequent computation and results obtained from the towing and self-propulsive tests.

The results of these tests substantially coincide with and verify the results of the comparative tests made on these models in 1922.

A chart showing the substantial coincidence of the two tests (1922 and 1936), defendant's exhibit #55, is by reference made a part of this finding. On this chart Model 2483 identifies the Hamacek model typical of the patented construction, and Model 2484, the conventional hull selected by Mr. Hamacek.

33. At the *inter partes* tests of November 1936, at the Washington Navy Yard, comparative tests also were made with a third model which had been constructed by the Government's experts.

This model referred to as Model 3273 was constructed with the forebody thereof as a duplicate of the forebody of the Hamacek patented form. This was done to eliminate as far as possible any differences which could be connected with a different design of the forebody.

The afterbody lines of the model were based upon the afterbody form disclosed in Figs. 79 and 80 of a publication entitled "The Speed and Power of Ships," by Taylor, published in 1916. A copy of Figs. 79 and 80 and the title page of this publication, defendant's exhibit #47, are by reference made a part of this finding.

In the Taylor body plan, a few of the after sections possessed a slight concavity where they merged into the deadwood. In the construction of the Government model these concavities were eliminated and convex sections existed throughout the entire afterbody thereby eliminating the deadwood and any reversed curvature, concavity, or water channels from the afterbody of the Government model. A set of drawings of the lines of the Government model, defendant's exhibit #45, is by reference made a part of this finding.

34. A hull contour, the afterbody of which is entirely formed by convex sections with no concavities or channels present, was old in the art prior to the filing date of the

Hamacek application which materialized into the patent in suit. Such a form of hull contour is disclosed in the publication entitled "Transactions of The Society of Naval Architects and Marine Engineers," published in 1903. A copy of Plate 56 and the title page of this publication, defendant's exhibit #48, are by reference made a part of this finding.

The U. S. Torpedo Boats *Nos. 6*, *7*, and *8* and Torpedo Boats *Davis* and *Fox* were constructed prior to 1919 and possessed afterbodies, the lines of which were entirely convex in character. Copies of the working plans of these torpedo boats, defendant's exhibits #49 and #50, are by reference made a part of this finding.

35. In the comparative tests of the Government Model 3273 in which concavities or water channels were entirely absent from the afterbody, said model gave a consistently better and more efficient performance at all speeds in both the resistance tests and self-propulsion tests than did the Hamacek model which typified the patented construction. A plot, defendant's exhibit #51, shows the relative efficiency curves of the Hamacek patented form and a United States Government model in the towing or resistance tests, and two sheets of plots, defendant's exhibits #51 and #52, show the comparative results of the self-propulsion tests of the United States Government model and the Hamacek patented model with two different types of propellers, one of which was furnished by Mr. Hamacek.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

In view of the facts established by the record in this case, the stated object of the invention, and the description of its construction as set forth in the patent in suit, we are of opinion that plaintiff is not entitled to recover. The essential facts established by the record are set forth in the findings. Plaintiff takes exceptions to certain of the findings and has proposed eighty-two additional findings. Upon consideration of these exceptions and the proposed additional findings in the light of the entire record in the case, and the

specifications and claims of the patent in suit, we are of opinion that they are not sustained by the record. No useful purpose would be served by a detailed discussion thereof in this opinion.

The facts show that if the claims of the patent are so construed as to read upon the alleged infringement structures, they are clearly anticipated by the prior art. The claims define the channels as extending upwardly and inwardly from substantially the midship section of the hull. The prior art shows many and varied forms of such channels commencing at various distances along the aft portion of the hull, and the record establishes that it has been the practice of naval architects for many years to provide an upwardly and inwardly extending water channel on each side of the aft portion of the hull on various types of ships, starting at various points along the ship's length adjacent the bilge and continuing to a point adjacent the stern. A construction of the claims sufficiently broad to cover whatever channels the alleged infringing ships may have, which channels begin at points considerably aft of the midship section of the hull, would clearly render the claims applicable to the prior art structures. If, on the other hand, the claims are narrowly construed to cover the channels extending from substantially the midship section, they do not apply to the structures of the alleged infringing ships which have no channels extending upwardly and inwardly from substantially their midship sections, and no infringement exists. (Finding 24.) Such structures as are found in any of the ships of the defendant extend through less than one-fourth of the length of the vessel rather than substantially the midship section to the stern. (Findings 13 and 14.)

With respect to the alleged infringing ships of the *Augusta* type, the frame members or stations of the aft portion of the hull are convex in form forward of and including frame 31. Frames 32, 33, and 34 have a concavity of the lower portion adjacent the deadwood of the ship; the remaining frames aft of 34 are all convex in form. The concavity extends through only three frames and this is only approximately 15 to 20 per cent of the after half-length of

the ship. In the alleged infringing ships of the *Salt Lake City* class, the frames of the aft portion of the hull forward of station 16 are convex in form. The frame 16 is substantially straight, except for a convex curvature at the upper end where it merges into the knuckle. The frame 16½ is concave in shape in its lower portion which merges into the deadwood. The succeeding frames aft of 16 show a concavity. The concavity begins between frame 16 and 16½ adjacent to the deadwood and extends through 35 to 40 per cent of the after half-length of the ship, but they do not extend upwardly and inwardly from substantially the midship section adjacent the bilge to a point adjacent the stern. For these reasons we think it is clear that plaintiff's patent has not been infringed. (Finding 25.)

After a careful consideration of the patent in suit in the light of its disclosures, we are of opinion that the patent is void through a lack of proper description. The description of the invention as set forth in the patent suggests that there should be concave longitudinal channels in the after underbody portion of the hull in order to utilize the impact of the water as an aid in impelling the vessel forward. It states only that the hull should be provided with such channels (p. 1, lines 61–84), and that their angularity or degree of curvature may vary, depending upon the draft, width, and speed of the ship (p. 1, lines 84–93, P. 2, lines 7–32, inclusive). No formula is stated by which such angularity may be determined nor is any specific example suggested for any given ship. As was said by the court in *Stewart* v. *American Lava Company*, 215 U. S. 161, "The public are told little more than to try experiments until they find a burner that works." See, also, the same case reported in 155 Fed. (2d) 731, 736, in which the point now under consideration is discussed at length.

The specification of the patent in suit states no law, rule, or example by which a determination may be made as to how the water channel surface for utilizing the water impact or pressure to drive the ship may be constructed on the patentee's theory that such impact or pressure is a driving force. Neither does the patent contain any specific descrip-

tion or detailed directions upon which a skilled naval architect would be able to construct, from the disclosure of the patent, a ship containing the channels intended by the patentee. The patent specifications refer merely to such surface without giving any specification or instruction as to their proper relation and location. It would be necessary for anyone constructing a ship hull with channels to carry on a series of experiments without aid from the patent to determine what type and size channels would be required for any specific ship. In *General Electric Company* v. *Wabash Appliance Corporation*, 304 U. S. 364, 369, the court said:

> Patents, whether basic or for improvements, must comply accurately and precisely with the statutory requirements as to claims of invention or discovery. The limits of the patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantage to others arising from uncertainty as to their rights. The inventor must "inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not."

We are of opinion that the patent in suit does not fulfill the requirements of the patent statute and is, therefore, void. *Isham* v. *United States*, 76 C. Cls. 1.

In view of the facts clearly established by the evidence and set forth in findings 13 and 14 with reference to the hull construction of the alleged infringing ships, plaintiff contends (1) that the channels covered by the specification and claims of the patent in suit need not start exactly at the midship line, "but anywhere within the midship section," which, it insists, is approximately the central one-third section of the vessel; (2) that the channels need not be depressed concave portions formed wholly within the normal body lines of the ship, but the channels may begin as flattened portions; and (3) that a raised portion,

such as a knuckle protruding from the side of the vessel, is also included in the patent as a channel. In other words, it is the position of the plaintiff that the channel covered by the patent may be in part a flattened portion of the hull and in part the convex frame members of the aft portion of the hull. We are clearly of opinion that these contentions cannot be sustained. The alleged invention is specifically set forth in the specification as comprising an upwardly and inwardly extending concave water channel formed on each side of the aft portion of the hull beginning at the midship section adjacent the bilge and extending to the stern (Finding 5). A channel within the meaning of the patent must have a concavity. The form and construction of the channels of the patent are definitely shown therein to have distinct upper and lower surfaces, as shown in the patent drawings. These channels cannot exist without these or similar concave surfaces, neither can the channel begin as a flat surface. It must start at the commencement of the concave surface or at the commencement of the upper and lower surfaces. The flat or convex surface of the bottom of a ship immediately forward of the channel cannot be a part of the channel. The patentee defines the meaning of the words "water channel," as used in the patent, as being the trough or channel which is formed by reason of the different angles or "slants" of the upper and lower surfaces. The convex frame members of the aft portion of the hull of the alleged infringing ships are just the reverse of this. Therefore, such convex frame members, together with the flattened outer surface of the hull, clearly do not form a concave channel. Moreover, the construction of the patent, for which plaintiff here contends, would simply add to the indefiniteness of the specification in the disclosure of any rule or direction which would enable one skilled in the art to practice the alleged invention.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

WHALEY, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAMS, *Judge*, took no part in this decision.

CORINNE GRIFFITH MARSHALL v. THE UNITED STATES

[No. 43286. Decided March 6, 1939. Plaintiff's motion for new trial overruled May 29, 1939]

On the Proofs

Income tax; account stated.—Where plaintiff and her husband, citizens of the State of California, had in 1927 entered into an agreement with reference to existing property rights between them; and where plaintiff and her husband filed separate income-tax returns for 1930, on basis of the said agreement; and where the Commissioner of Internal Revenue, after examining these returns, disregarded the agreement and determined that the income of plaintiff and her husband for Federal tax purposes should be allocated according to the community property laws of California; and accordingly an overassessment was computed in favor of the plaintiff and a deficiency found against her husband; and in 1933 the Bureau of Internal Revenue, pursuant to such determination, advised plaintiff to file a claim for refund; and such claim was duly filed by plaintiff, and a certificate of overassessment in favor of the plaintiff was prepared but was subsequently canceled by the Commissioner without having been forwarded to the collector or delivered to the plaintiff; and on May 14, 1934, the Bureau wrote to plaintiff that her return for 1930 was under consideration, and on the basis of information on file, it was the opinion of the Bureau that the return should be adjusted in accordance with recommendations made in revenue agent's report, but that action was deferred pending decision of a similar case in the United States Circuit Court of Appeals, it is held that the evidence fails to disclose the necessary elements of an account stated.

Same.—An "account stated" must be or contain a statement of the balance of the account, that is, a balance must be struck and an account rendered to the other party for that balance.

Same.—The Commissioner's action in making a preliminary examination of the account, his erroneous conclusion as to the amount of taxes due, and his direction to file a refund claim, taken singly or considered together, did not bind the defendant to allow and pay plaintiff's claim.

Same; community property under California statute.—Under the decision of the United States Circuit Court of Appeals in the case of *Helvering, Commissioner,* v. *Hickman,* 70 Fed. (2d) 985, in which the precise issue raised by plaintiff was presented, it is held that the final action of the Commissioner in rejecting the

claim for refund was correct; "by the law of California, as construed by her courts, the earnings of the wife never became community property if the husband and wife have agreed that they shall be and remain her separate property."

Same; overpayment of tax.—Under the rule laid down in *Lewis* v. *Reynolds*, 284 U. S. 281, the ultimate question is whether the taxpayer has overpaid her tax.

The Reporter's statement of the case:

Mr. A. E. James for the plaintiff.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, pursuant to the stipulation of the parties:

During the year 1930 the plaintiff was a resident and citizen of California, married and living with her husband, Walter Morosco. Prior thereto, on November 30, 1927, she and her husband had entered into an agreement with reference to existing property rights between them providing in substance that all property acquired by either of the parties after that date should be the sole and separate property of the party so acquiring the same, free and clear of any and all claims of the other, either community or otherwise.

For the year 1930 each filed a return of income with the collector of Internal Revenue in which each reported his or her own separate earnings as the income of the party so reporting it. The plaintiff reported for this year a net income of $283,821.44 and a tax liability of $55,442.91 which was duly paid. The plaintiff's husband, Walter Morosco, returned an income of $60,192.79 and a tax liability of $6,754.07 for the calendar year 1930. After an examination of the books and records of plaintiff and her husband, the Commissioner of Internal Revenue determined that their income for Federal tax purposes should be allocated according to the community property laws of the State of California—that is, one-half the income earned by each spouse should be attributed to the other. As a result of this determination by the Commissioner, an overassessment was computed by him in favor of the plaintiff in the amount of $23,275.58 and a

deficiency found against her husband, Walter Morosco, in the amount of $24,955.94 with interest of $6,046.86, or a total sum of $31,022.80, which was assessed on March 29, 1935. Notice of the assessment and demand for payment was duly made upon Morosco but no part of the amount so assessed has been paid.

On June 13, 1933, the Bureau of Internal Revenue addressed a telegram to the plaintiff inviting her to file immediately with the collector a claim for refund in the amount of $23,275.58 for the year 1930 because of the transfer of one-half of her income to her husband's return, and on June 14, 1933, the plaintiff filed a claim for refund for the year 1930 in the amount stated in the Bureau's telegram. Subsequently a certificate of overassessment was prepared in the Bureau of Internal Revenue in that amount but this certificate was later canceled by the Commissioner without having been forwarded to the collector or delivered to the plaintiff. The record does not disclose that this certificate of overassessment was ever entered on a schedule of overassessments signed by the Commissioner of Internal Revenue. No ruling was made on plaintiff's claim for refund, but no payment has been made thereon.

On May 14, 1934, the Bureau of Internal Revenue advised the plaintiff that her income tax return for the year 1930 was under consideration and that in the opinion of the Bureau her income should be adjusted in accordance with the recommendations made in a revenue agent's report which had been followed in determining the plaintiff's taxes and issuing the certificate of overassessment, but it was further stated that because the case involved the question of the effect for Federal tax purposes of the agreement entered into by plaintiff and her husband regarding their community property and a similar case was then pending in a United States court, it was deemed advisable to defer action in her case until the court had rendered a decision on the question. She was further advised that she might make a written application for the execution of a consent agreement extending the period of limitations for assessment. A form for this purpose was enclosed and the consent was executed and forwarded to the Commissioner of Internal Revenue who also executed the

same, thereby extending the period for assessment of taxes for the year 1930. Similar proceedings were had with the plaintiff's husband.

On May 25, 1934, an authorized representative of plaintiff and her husband addressed a telegram to the Bureau of Internal Revenue stating that both parties would be willing to close their cases by allowing their returns to remain as filed, or to be adjusted on a community property basis allowing the plaintiff's refund to pay her husband's deficiency provided the entire deficiency was eliminated. To this telegram the Bureau responded in effect that the closing of the cases of the plaintiff and her husband must be deferred pending the action of the Bureau on a decision of the Circuit Court of Appeals in the *Howard C. Hickman case* decided May 14, 1934. On March 5, 1935, Walter Morosco filed with the Bureau a "waiver of restriction on assessment and collection of deficiency in tax" and therein consented to the assessment and collection of the deficiency asserted against him for the year 1930 in the amount of $24,955.94. After some further correspondence the Bureau, in May 1935, addressed a letter to the representative of the plaintiff advising him that the certificate of overassessment which had been prepared in favor of the plaintiff would be held pending the payment of the deficiency assessed against her husband. Later the representative of the plaintiff addressed a letter to the Commissioner advising him that plaintiff and her husband had been divorced and urging the Bureau to release the certificate of overassessment which was being withheld. In June 1935 the Bureau advised the plaintiff's representative that the certificate of overassessment would not be released until the Morosco deficiency had been satisfied, and in October the Bureau announced that the amount of the overassessment which had been determined in favor of the plaintiff would not be refunded.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit to recover an alleged overpayment of income taxes for the year 1930.

Opinion of the Court

It appears from the findings that in 1927 plaintiff and her husband, being then, and at all times involved in the suit, citizens of the State of California, entered into an agreement with reference to existing property rights between them providing in substance that all property acquired by either of the parties after that date should be the sole and separate property of the party so acquiring the same, free and clear of any and all claims of the other, either community or otherwise.

In filing a return for her income tax for the year 1930, the plaintiff appears to have assumed that this agreement was in force and reported that her personal net income was $283,-821.44 and her tax liability $55,442.91, which was duly paid. Her husband also filed a return of his personal income and tax liability for the same year in accordance with the agreement. The Commissioner of Internal Revenue, however, after examining these returns, disregarded the agreement and determined that the income of plaintiff and her husband for Federal tax purposes should be allocated according to the community property laws of the State of California, that is, one-half the income earned by each spouse should be attributed to the other. Accordingly, an overassessment was computed in favor of the plaintiff and a deficiency found against her husband. Notice and demand for the payment of this deficiency was made upon the husband but no part of the amount so assessed has ever been paid. The Bureau, instead of following its original determination with reference to the taxes of the plaintiff, canceled the overassessment and has collected from plaintiff the amount of tax liability shown by her return.

The plaintiff contends that the action of the Commissioner together with subsequent proceedings on the part of the Bureau of Internal Revenue constituted an account stated in her favor upon the basis of the original determination of plaintiff's tax by the Commissioner. A claim for refund of the sum collected was duly filed and this suit begun to recover the amount thereof.

The plaintiff also insists that her income tax was correctly determined by the Commissioner in the first instance and that a refund is due her in the amount of the overassessment as computed.

In support of her contention that an account stated was rendered the plaintiff relies on a number of facts and circumstances. Those which have been specially urged as important will be considered.

On June 13, 1933, the Bureau, pursuant to the determination that the income of plaintiff and her husband should be allocated according to the community property laws of the State of California, telegraphed the plaintiff to "file claim immediately with collector" for $23,275.58 year 1930 "basis transfer one-half community income to husband's return." In accordance with this direction, the plaintiff filed a claim for refund for the year 1930 in the amount above stated and later the Commissioner prepared a certificate of overassessment in favor of the plaintiff for $23,275.58, but this certificate was subsequently canceled by the Commissioner without having been forwarded to the collector or delivered to the plaintiff. The record does not show the date of preparation or the date of cancellation.

Still later and on May 14, 1934, the Bureau wrote to plaintiff in substance that it had under consideration her income tax return for the year 1930 and that "on the basis of the information now on file with your return, it is the opinion of this office that your taxable income as reported should be adjusted in accordance with the recommendations contained in the revenue agent's report," that is, one-half of the income earned by each spouse should be attributed to the other. The communication further stated that a case involving a similar issue was pending in the United States Circuit Court of Appeals and that it was deemed advisable to defer action until a decision had been rendered by the court on the question. The attention of the taxpayer was called to the fact that the statutory period within which final notice of deficiency might be issued would expire in the near future and the taxpayer was advised that she had the right to make a written application for the execution of a consent extending the period of limitation for assessment. This resulted in a consent to extension of the period of limitation being executed by the plaintiff and the Bureau of Internal Revenue. The same kind of a notice was sent to the plaintiff's husband and the same action taken. Later and on May 25, 1934, the

representative of the plaintiff telegraphed the Deputy Commissioner of Internal Revenue that plaintiff and her husband would be willing to close cases by allowing returns to remain as filed disallowing wife's claim for refund, or on a community basis allowing wife's refund to pay husband's deficiency provided entire deficiency was eliminated by such procedure. The Bureau replied that the closing of the cases must be deferred pending action of the Bureau in regard to a case in the Circuit Court of Appeals. On August 24, 1934, the representative of the plaintiff wrote the Commissioner of Internal Revenue with reference to the refund claim of the plaintiff asking that he be advised when he might expect some action on the claim.

There was further correspondence between the plaintiff's representative and the Bureau with reference to the claim of the plaintiff for refund which the plaintiff sought to have allowed and paid, the Bureau on its part giving various reasons for not complying with the plaintiff's request. Finally, on January 3, 1936, the Commissioner sent a communication to plaintiff's attorney stating that the overassessment would not be released as the deficiency assessed against Mr. Morosco had not been paid, and that—

> It is the position of this office that in cases involving the transfer of income from the return of one taxpayer to that of another, the amount of the overassessment disclosed may not be refunded to the detriment of the government.

In the view of the court, there is nothing in this correspondence material to the determination of the case except that the final communication was in effect a refusal to allow the claim for refund.

We think the evidence fails to disclose the necessary elements of an account stated. An "account stated" must be or contain a statement of the balance of the account, that is, a balance must be struck and an account rendered to the other party for that balance. 1 C. J. S. sec. 22, p. 703. No account of any kind was ever rendered to the plaintiff. Under a misapprehension of the law, the Commissioner originally held that there had been an overassessment of plaintiff's taxes and prepared a certificate to that effect. This certificate,

however, was withheld in the Bureau and subsequently canceled. There was nothing in this action that shows that plaintiff was presented with an account showing a balance due her. On the contrary, the withholding of the certificate and its subsequent cancellation showed that the Bureau had not definitely determined what should be done with reference to plaintiff's taxes. The Commissioner also sent a telegram to plaintiff directing her to "file immediately a claim for refund." But this was not a promise to pay the claim, it was merely advice with reference to the protection of her rights in case it should eventually be found she was entitled to the refund. The action was commendable on the part of the Commissioner as taxpayers often fail to file their claims in time and by reason thereof find themselves barred by the statute of limitations. A promise to refund a definite sum or a statement that a definite sum is due the other party has sometimes been held to constitute an account stated, but here there was no promise either of allowance or payment, or even an admission that a definite sum was due. The Commissioner's action in making a preliminary examination of the account, his erroneous conclusion as to the amount of taxes due, and his direction to file a refund claim taken singly or considered together, did not bind the defendant to allow and pay plaintiff's claim.

In the brief of counsel for plaintiff many cases are cited, none of which in our opinion support the contention made. In *Wood* v. *United States*, 84 C. Cls. 367, the Commissioner not only determined an overpayment but sent a certificate of overassessment to the taxpayer in which a balance of the account was struck and shown to be due plaintiff. The Commissioner, however, determined that this amount acknowledged to be due could not be paid for the reason that a claim for it was barred by the statute of limitations. Here a complete account was rendered, a balance struck and agreed upon by the parties. The court held that the error of the Commissioner with reference to the effect of the statute of limitations did not prevent the plaintiff from claiming an account stated. In the case of *Shipley Construction Co.* v. *United States*, 79 C. Cls. 736, the plaintiff was not only advised that an audit of its income tax showed an overassessment and the amount

thereof but other statements in the letter of advice were such in the opinion of the court as to imply a promise to pay the same and make it an account stated. In the case before us, there is nothing from which such a promise can be implied. On the contrary, the defendant was continually giving reasons why it would not pay the claim.

The case of *Daube* v. *United States*, 75 C. Cls. 633, affirmed 289 U. S. 367, was similar in many respects to the one at bar. In that case the Commissioner prepared a certificate of overassessment and went so far as to enter this certificate on a schedule of refunds and credits which was signed by him and issued a check in favor of the taxpayer; after which the Commissioner prepared a letter stating the amount of the overassessment which, with the check for the amount thereof, was sent to the collector. The collector, perceiving that an error had been made, did not forward the check or the letter to plaintiff but returned the check to the Commissioner. The taxpayer claimed that this action of the Commissioner constituted an account stated. The Supreme Court said "there had been messages back and forth between the officers and branches of an administrative bureau," as there had been in the instant case, but by none of these acts had the Commissioner divested himself of control of the matter and the court held in effect that he had the right to rescind his original action. In stating the elements of an account stated this court said in the *Daube case*, *supra*, that the rule is absolute that "unless some kind of an account or statement is presented or communicated by one party to the other which shows the balance due on the accounts between the parties, there is no foundation for a claim upon an account stated." In the case before us there was no such statement or communication. It is true the Bureau did direct the plaintiff to file a claim for a certain amount, but the plaintiff was not told that this amount was due her or that it would be paid. We have stated above the reasons for this direction being given. In the argument on behalf of plaintiff it is said that what was "done by the Commissioner has never been undone." The cancellation of the certificate of overassessment was sufficient abrogation of the prior action of the Commissioner if anything was necessary to set aside what had originally been

done. We think, however, nothing was necessary as the defendant still retained control of the whole matter and the refusal or failure of the Bureau to pay the claim for refund was a sufficient denial of the claim. It is immaterial that the reasons given by the Commissioner for his action were neither logical nor a correct statement of legal principles. As will be shown further on, the Commissioner erred in his construction of the California statute and he was equally unfortunate in giving the reasons for his final conclusion. But this does not affect the determination of the case which must be decided in accordance with legal principles.

In this connection the plaintiff argues that the original action of the Commissioner was presumptively correct and that in the absence of affirmative pleading the plaintiff is entitled to recover.

We know of no such rule. The final determination of the Commissioner when disputed by the taxpayer is presumed to be correct in the absence of evidence showing the contrary but that rule has no application here. The Commissioner was not bound to adhere to his original ruling if he subsequently found it was not in accordance with the law as applied to the facts in the case.

It is also argued on behalf of the plaintiff that the Commissioner was right when in the first instance he disregarded the property agreement between the plaintiff and her husband and held that for Federal income tax purposes the income of both was community property under the laws of California and that the plaintiff was only liable for taxes computed accordingly; in other words, that the overassessment of the plaintiff as originally computed by the Commissioner was correct and that plaintiff should have the amount thereof refunded. In support of this contention, counsel for plaintiff presents an elaborate discussion of both Federal and State cases in which was involved either directly or indirectly the question of the effect of agreements between husband and wife, citizens of California, providing that all property acquired by either party subsequent to the date of the agreement should be the sole and separate property of the party acquiring the same. The plaintiff takes the position that neither

the California cases nor the decisions of the United States courts show that the original determination of the Commissioner was erroneous.

That this last contention on the part of plaintiff is not well founded is settled by so many and well reasoned cases it does not seem necessary to add anything to the conclusions reached therein. Moreover, an attempt to review all of the cases cited on behalf of plaintiff would unduly extend the limits of this opinion. The precise issue now raised by plaintiff was presented to the Board of Tax Appeals in the case of *Howard C. Hickman* v. *Commissioner*, 27 B. T. A. 807. In that case the Commissioner held that such agreements could not operate to prevent the allocation of one-half of the community income to each spouse for income tax purposes in a community property State. The Board of Tax Appeals reversed the holding of the Commissioner, and an appeal was taken to the Circuit Court of Appeals for the Ninth District under the title of *Helvering, Commissioner*, v. *Hickman*, 70 Fed. (2d) 985. The decision of the Board of Tax Appeals was affirmed, following an elaborate opinion in which all of the principal cases bearing on the subject were considered, including most of those cited by plaintiff. The decisions bearing on the effect of the validity of agreements made by citizens of California with reference to community property were carefully analyzed and the opinion stated positively that—

> By the law of California, as construed by her courts, the earnings of the wife never became community property if the husband and wife have agreed that they shall be and remain her separate property.

The case of *Poe* v. *Seaborn*, 282 U. S. 101, was examined in connection with *Goodell, Collector*, v. *Koch*, 282 U. S. 118; *Hopkins, Collector*, v. *Bacon*, 282 U. S. 122; and *Bender, Collector*, v. *Pfaff*, 282 U. S. 127. All were found to hold in effect that the earnings of either husband or wife were to be taxed according to the ownership of the earnings under the laws of the State of which they were residents, and *Lucas* v. *Earl*, 281 U. S. 111, was distinguished. We think nothing needs to be added to the reasoning of this well considered opinion which disposes of the question now before us.

After this decision was rendered, the Bureau, having further considered the construction placed by the California courts on agreements made by husband and wife under the community property laws, announced that the *Hickman case* would be followed in determining the tax liability of husband and wife residing in California who have entered into a valid agreement providing that the earnings of each should be the separate property of the earner. Proceeding accordingly, the tax against the plaintiff was reaudited, assessed, and collected from plaintiff in accordance with her return. Under the rule laid down in *Lewis* v. *Reynolds*, 284 U. S. 281, the ultimate question is whether the taxpayer has overpaid her tax. Our conclusion is that she has not.

It follows that the plaintiff's petition must be dismissed and it is so ordered.

WHALEY, *Judge*; and BOOTH, *Chief Justice*, concur.
WILLIAMS, *Judge*, took no part in this decision.

LITTLETON, *Judge:* I am of opinion that the Commissioner's original determination computing plaintiff's income and tax for 1930 on the community property basis was correct under the California statute as amended in 1927 and *United States* v. *Malcolm*, 282 U. S. 792, and that the agreement between plaintiff and her husband was ineffectual to provide a different basis. However, since plaintiff returned income which, under the community interest, was taxable to her husband and in the absence of facts to the contrary, it must be assumed that the tax of $23,275.58 here involved was likewise paid out of the community income erroneously reported by plaintiff. The Commissioner, therefore, acted correctly when he refused to make a refund to plaintiff. Compare *Benjamin Clayton*, 77 C. Cls. 770, 44 Fed. (2d) 427; *Lattimore et al.* v. *United States*, 82 C. Cls. 97, 130, 131. The refund provision should have a practical application. In a case such as this we cannot assume that the tax applicable to the community income taxable to the husband, which plaintiff remitted, belonged to plaintiff any more than did

the income erroneously reported by her. Therefore, a tax paid by either husband or wife out of community property follows the community income for tax purposes. The facts and circumstances involved in this case distinguish it from *Krug* v. *United States*, 84 C. Cls. 502. I therefore concur in the decision dismissing the petition.

NEW WORLD LIFE INSURANCE COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 43549. Decided March 6, 1939. Plaintiff's motion for new trial overruled May 29, 1939]

On the Proofs

Income tax; deductions allowable to a life insurance company in respect to investment expenses.—Where plaintiff deducted from its gross income as investment expenses all amounts charged in its investment department representing direct and actual investment expenses wholly incurred and paid in the investment department, and, in addition, the amounts on account of officers' and cashiers' salaries apportioned to and included in investment expenses in accordance with a resolution of its board of directors; and where the actual investment expenses exceeded one-fourth of 1 per centum of the mean of the book value of plaintiff's invested assets at the beginning and end of the taxable year, it is held that the Commissioner properly excluded as a part of the deduction that part of the salaries of officers and cashiers apportioned to and included in investment expenses. (Revenue Act of 1928, section 203 (a) (5).)

Same; "general expenses."—That "general expenses" may be reasonably susceptible of apportionment does not take them out of the class of general expenses within the meaning of the proviso of section 203 (a) (5).

Same; legislative history.—Legislative history of the provisions of the revenue acts relating to the taxation of incomes of life insurance companies reveals that since only the income from the investment department was to be taxed, Congress intended that only the actual investment expenses should be allowed as a deduction when a deduction in excess of the one-fourth of 1 per centum of the mean of invested assets was permitted.

Syllabus

Same; power of Congress.—Congress may condition, limit, or deny deductions from gross income in order to arrive at the net income that it chooses to tax.

Same; exclusion of general expenses as deduction.—Since premium income was not being taxed, and the untaxed premiums contained amounts for payment of the company's expenses, including all its general expenses, Congress deemed it necessary to make provision as to the maximum deduction allowable against the investment income so as to prevent the apportionment and the inclusion of the general expenses in this deduction.

Same.—Such apportionments and allocations involve approximations, estimates, or guesses which were a feature of administration which, it appears, Congress desired by the *proviso* to avoid.

Same.—To allocate and say absolutely just what investment expenses have been precludes the idea (in view of the language of the *proviso*) of a division of general expenses and the assignment or inclusion of a portion thereof as an "investment expense."

Same; reserves held for health and accident insurance.—It is held that reserves set aside for health and accident insurance contracts are not properly to be included for the purpose of deduction from income for tax purposes, in the "reserve funds required by law" to be held by a life insurance company, under section 203 (a) (2), Revenue Act of 1928.

Same.—When an insurance company has been classified as a life insurance company in accordance with section 201 (a), the reserves to be included under section 203 in determining the 4 per centum deduction are those reserves which are held by such company on account of its life insurance and annuity contracts; this excludes reserves for such casualty insurance as a life insurance company may write.

Same; life insurance reserves.—Life insurance reserves are, in effect, and always in the end, the property of the policyholder.

Same; life and casualty insurance.—In the case of a company which writes life and also casualty insurance, Congress intended the reserve deductions to conform to the special plan for taxation of life insurance companies; the inclusion of reserves maintained out of premiums which belonged, when paid, to the company would not comport with the statutory plan.

Same; combined policies.—In policies which combine life, health, and accident insurance, the health and accident portions are entirely separate contracts.

Same.—If a life insurance company writing combined policies were permitted to take a deduction in respect of the health and accident reserves, this allowance would result in a deduction to a life insurance company for casualty reserves which even a casualty company is not permitted to take for this class of insurance under the taxing provisions relating to such companies.

Same; "reserve funds."—"Reserve funds required by law" within the meaning of the taxing acts are those technical insurance reserves which are peculiar to the character of insurance companies claiming the deduction.

Same; taxation of casualty companies.—The basis upon which casualty insurance companies are taxable is quite different from that of life insurance companies, and no deduction whatever is allowed on account of the mean of the reserve funds but instead a deduction is allowed for claims accrued or losses incurred.

Same; departmental regulations.—Although departmental regulations and practice will, in a proper case, be given great weight, they cannot abridge the law and they can only stand if they correctly interpret the statute.

Same; deductions.—Deductions from gross income are matters of grace; only those items which clearly come within the class to which the particular statutory provision relates may be allowed; the rule that statutes levying taxes may not be extended by implication beyond the clear import of the language used nor their operations enlarged so as to embrace matters not specifically pointed out applies with equal or greater force to the determination and allowance of deductions.

The Reporter's statement of the case:

Mr. Walter E. Barton for the plaintiff.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Fred K. Dyar* and *Mr. Robert Anderson* were on the brief.

Plaintiff seeks to recover $13,603.83, of which $12,176.26 represents alleged overpayments of income tax for 1929 to 1932, inclusive, and $1,427.57 represents alleged overpayment of interest on additional taxes collected for those years.

The two questions presented are (1) whether the apportionment by plaintiff, a life insurance company, to its investment expenses of a percentage of the salaries paid to its general officers and cashiers for services performed and to be performed by them in all departments of its business constitutes an assignment or inclusion of "general expenses in part to investment expenses" within the meaning of section 203 (a) (5) of the Revenue Acts of 1928 and 1932; and (2) whether, in determining the deduction from gross income of the specified percentage of the mean of the reserves at the beginning and end of each taxable year, plaintiff is

entitled under sections 201 (a) and 203 (a) (2) of the revenue acts above mentioned to include as a part of the "reserve funds required by law" its reserves for Total and Permanent Disability Benefits under policies of Health and Accident Insurance for 1929 to 1932.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a Stock Life Insurance Company, organized and existing under the laws of the State of Washington with its principal offices in Seattle. During 1929 to 1932, inclusive, and prior thereto, plaintiff was engaged in the business of issuing and selling life insurance in Washington and other states of the United States. It writes nonparticipating policies of life insurance on the level-premium plan, the mean of the reserve funds of which, held for the fulfillment of such life insurance contracts for the years involved herein, was as follows:

1929	$6,761,711.16
1930	7,400,545.31
1931	7,892,137.96
1932	8,117,372.90

Among the policies of life insurance issued by plaintiff, and which it had outstanding during 1929 to 1932, inclusive, were certain life insurance policies which contained additional provisions for Total and Permanent Disability Benefits and/or Accidental Death Benefits, the mean of the reserve funds of which, held for the fulfillment of such disability and accidental death benefit contract, was as follows:

1929	$149,687.89
1930	195,305.12
1931	201,889.46
1932	230,886.50

Plaintiff issues separate life policies, but issues no separate policies covering disability benefits and/or accidental death benefits. Its life insurance contracts of combined life, health, and accident insurance constitute all the classes of insurance issued by it.

2. Plaintiff filed income-tax returns for 1929 to 1932, inclusive. Its return for 1929 disclosed a net income of

$50,622.99, and a tax of $5,568.53 which it paid in the amounts of $1,392.14 on February 25, 1930, and $4,176.39 on June 12, 1930. Thereafter the Commissioner of Internal Revenue assessed an additional tax for that year of $1,408.82 which was paid March 21, 1932, together with interest thereon of $166.41.

3. In its return for 1929 plaintiff deducted from gross income as investment expenses the sum of $51,134.56, of which $17,149.92 consisted of the following items:

50% of its president's salary	$9, 000. 00
80% of its treasurer's salary	6, 799. 92
75% of its general counsel's salary	1, 350. 00
Total	$17, 149. 92

In his final determination for 1929, the Commissioner, among other adjustments,

(a) Allowed plaintiff an additional deduction for investment expenses of $4,745.65, which it had not taken in its return and which is not in dispute in this case;

(b) Disallowed the above items aggregating $17,-149.92 as deductions on account of investment expenses, which plaintiff claims it is entitled to in this case;

(c) Allowed a deduction of 4 per centum of the mean of reserves for Total and Permanent Disability Benefits, which the defendant claims are not allowable deductions as reserves required by law within the meaning of the Tax Act in the case of a Life Insurance Company. Four percent of the mean of such disability reserves so allowed is:

For active lives	$3, 142. 51
For disabled lives	2, 439. 77
Total	$5, 582. 28

4. One-fourth of 1 per centum of the mean of plaintiff's invested assets for 1929 is $21,465.27.

5. Plaintiff's return for 1930 disclosed a net income of $59,839.94, and a tax of $7,180.79 which it paid in three installments of $1,795.20 each on February 11, June 11, and August 29, 1931, and of $1,795.19 on December 1, 1931. Thereafter the Commissioner assessed an additional tax for this year of $3,115.89 which plaintiff paid April 22, 1933, together with interest thereon of $386.20.

Reporter's Statement of the Case

6. In its return for 1930, plaintiff deducted from gross income as investment expenses the sum of $62,690.06, of which amount $21,492.21 consisted of the following items:

50% of its president's salary	$9, 000. 00
80% of its treasurer's salary	7, 899. 92
75% of its general counsel's salary	1, 350. 00
25% of its cashier's salary (Seattle District)	580. 16
50% of its cashier's salary (Oakland District	770. 00
25% of its cashier's salary (Portland District)	180. 00
50% of its cashier's salary (Los Angeles District)	1, 607. 50
50% of cost of its president's bond 80% of cost of its treasurer's bond 25% of cost of its cashiers' bonds	104. 63
Total	$21, 492. 21

In his final determination for this year, the Commissioner, among other adjustments,

(a) Disallowed the above items aggregating $21,-492.21 as deductions on account of investment expenses, which plaintiff claims it is entitled to in this case;

(b) Allowed a deduction of 4 per centum of the mean of reserves for total and permanent disability benefits, which the defendant claims are not allowable deductions as reserves required by law, within the meaning of the Tax Act in the case of a Life Insurance Company. Four percent of the mean of such disability reserves so allowed is:

For active lives	$2, 634. 84
For disabled lives	3, 817. 28
Total	$6, 452. 12

7. One-fourth of 1 per centum of the mean of plaintiff's invested assets for 1930 is $23,243.10.

8. Plaintiff's return for 1931 disclosed a net income of $34,927.40, and a tax of $4,191.29, which it paid in three installments of $1,047.83 each on March 7, June 14, and September 14, 1932, and $1,047.80 on December 14, 1932. Thereafter the Commissioner assessed an additional tax for this year of $3,755.44 which plaintiff paid October 11, 1933, together with interest thereon of $347.25.

9. In its return for 1931, plaintiff deducted from gross income, as investment expenses, the sum of $64,943.14, of which $24,124.61 consisted of the following items:

50% of its president's salary	$9,000.00
80% of its treasurer's salary	7,999.92
75% of its general counsel's salary	2,193.75
50% of its cashier's salary (Spokane District)	1,660.00
25% of its cashier's salary (Seattle District	346.32
50% of its cashier's salary (Oakland District)	872.50
25% of its cashier's salary (Portland District)	332.50
50% of its cashier's salary (Los Angeles District)	1,600.00
50% of cost of its president's bond 80% of cost of its treasurer's bond 50% of cost of its cashiers' bonds (Oakland, Spokane, Los Angeles, and San Diego Districts) 25% of cost of its cashiers' bonds (Seattle, Portland Districts)	119.62
Total	24,124.61

In his final determination for 1931, the Commissioner, among other adjustments,

(a) Disallowed the above items aggregating $24,124.61 as deductions on account of investment expenses which plaintiff claims it is entitled to in this case:

(b) Disallowed other deductions as follows:

(1) 4% of mean of reserves overstated on account of supplementary contracts, disability benefits, and policies upon which a surrender value may be demanded	$7,653.79
(2) Investment expenses on the ground that they were capital expenditures	3,923.11
(3) Real estate expenses on the ground that they were capital expenditures	1,005.72
Total	12,582.62

The above disallowed deductions are not in dispute in this case, except that included in the above item of $7,653.79 is an item of $4,937.58 representing four per centum of the mean of reserves held by plaintiff on account of disability benefits, disabled lives, which the Commissioner disallowed as a deduction and which the plaintiff claims it is entitled to in this case.

(c) Allowed a deduction of 4 per centum of the mean of reserves for Total and Permanent Disability Benefits, Active Lives, amounting to $2,743.76, which the defendant claims is not an allowable deduction as reserves required by law within the meaning of the Tax Act in the case of a Life Insurance Company;

Reporter's Statement of the Case

(d) Allowed the following additional deductions from gross income:

(1) Depreciation on farm buildings	$3, 675. 26
(2) Interest paid on supplementary contracts	2, 000. 00
Total	5, 675. 26

The foregoing additional deductions allowed by the Commissioner are not in dispute in this case.

10. One-fourth of 1 per centum of the mean of plaintiff's invested assets for 1931 is $24,513.65.

11. Plaintiff's return for 1932 disclosed a net income of $10,256.82, and a tax of $1,410.31 which it paid in three installments of $352.58 on March 15, June 10, and September 8, 1933, and $352.57 on November 29, 1933. Thereafter the Commissioner assessed additional taxes for this year, which it paid, with interest, as follows:

		Interest
January 18, 1935	$744. 17	$81. 43
February 8, 1935	30. 00	3. 28
June 22, 1935	3, 865. 33	521. 55

12. In its return for 1932 plaintiff deducted from gross income as investment expenses the sum of $63,502.01, of which $26,634.31 consisted of the following items:

50% of its president's salary	$9, 000. 00
80% of its treasurer's salary	7, 999. 92
75% of its general counsel's salary	4, 214. 51
50% of its cashier's salary (Spokane District)	1, 990. 00
25% of its cashier's salary (Seattle District)	302. 50
50% of its cashier's salary (Oakland District)	1,120. 00
25% of its cashier's salary (Portland District)	332. 50
50% of its cashier's salary (Los Angeles District)	1, 600. 00
Total	26, 559. 43
80% of cost of its treasurer's bond; 50% of cost of its cashiers' bonds (Oakland, Los Angeles, and Spokane Districts); 25% of cost of its cashiers' bonds (Seattle and Portland Districts)	74. 88
Grand total	26, 634. 31

Reporter's Statement of the Case

In his final determination for this year, the Commissioner, among other adjustments,

(a) Disallowed the above items aggregating $26,634.31 as deductions on account of investment expenses, which plaintiff claims it is entitled to in this case;

(b) Disallowed other deductions, as follows:

(1) 3¾ per centum of the mean of reserves overstated on account of supplementary contracts, disability benefits, and policies upon which a surrender value may be demanded	$7, 546. 62
(2) Investment expenses on the ground that they were capital expenditures	4, 850. 75
(3) Real estate expenses on the ground that they were capital expenditures	4, 519. 76
Total	$16, 917. 13

The above disallowed deductions are not in dispute in this case, except that included in the above item of $7,546.62 is an item of $4,920.24 representing 3¾ per centum of the mean of reserves held by plaintiff on account of Disability Benefits, Disabled Lives, which the Commissioner disallowed as a deduction and which the plaintiff claims it is entitled to in this case.

(c) Allowed a deduction of 3¾ per centum of the mean of reserves for Total and Permanent Disability Benefits, Active Lives, amounting to $3,402.21, which the defendant claims is not an allowable deduction as reserves required by law within the meaning of the Tax Act in the case of a Life Insurance Company;

(d) Allowed the following additional deductions from gross income:

(1) Depreciation on farm buildings	$5, 272. 06
(2) Interest paid on supplementary contracts	1, 638. 30
Total	$6, 910. 36

The foregoing additional deductions allowed by the Commissioner are not in dispute in this case.

13. One-fourth of 1 per centum of the mean of plaintiff's invested assets for 1932 is $24,872.81.

14. There are in evidence, as a part of the stipulation of facts, copies of the Commissioner's letters of final determination of plaintiff's tax liabilities for the years 1929 and 1930; also a copy of the Commissioner's letter of final

determination of plaintiff's tax liabilities for 1931 and 1932. These letters of final determination are made a part hereof by reference.

15. November 22, 1929, the Board of Directors of the plaintiff passed the following resolution, which was not modified or rescinded prior to the end of the taxable year 1932:

> That in connection with office salaries paid, the Company's disbursements for such purposes during the year 1929 and in succeeding years, until by proper Board Resolution the ratios herein shall be changed, shall be charged as between Investment and Insurance expense in the following proportions:

Name	*Investment*	*Insurance*
John J. Cadigan (President)	50%	50%
Edward J. O'Shea (Treasurer)	80%	20%
Graves, Mizer & Graves (General Counsel)	75%	25%
R. L. McGinnis	100%	
F. W. Maddux	100%	
Cashier in Seattle Office	25%	75%
Cashier in Oakland Office	50%	50%
Cashier in Portland Office	25%	75%
Cashier in Los Angeles Office	50%	50%
Cashier in San Diego Office	25%	75%
All employees in home office Investment Department	100%	
All employees in home office Policy Loan Department	100%	

The salaries paid by plaintiff to the officers and cashiers named during the taxable years involved were as follows:

	1929	1930	1931	1932
President	$18, 000. 00	$18, 000. 00	$18, 000. 00	$18, 000. 00
Treasurer	8, 500. 00	9, 875. 00	10, 000. 00	10, 000. 00
General Counsel	1, 800. 00	1, 800. 00	3, 112. 50	5, 619. 08
Seattle Cashier		2, 320. 64	1, 325. 28	1, 210. 00
Oakland Cashier		1, 540. 00	1, 750. 00	2, 240. 00
Portland Cashier		720. 00	1, 330. 00	1, 330. 00
Los Angeles Cashier		3, 215. 00	3, 200. 00	3, 200. 00
Spokane Cashier			3, 200. 00	3, 980. 00

The salaries of these officers and cashiers of plaintiff were for all services rendered by them, and the services performed and expected to be performed by such officers and cashiers related to matters in all departments of plaintiff's business, that is, in both the investment and underwriting departments.

Plaintiff charged to its investment department and deducted as investment expenses in its income tax returns for 1929 to 1932, inclusive, amounts equal to the same percentages of the total salaries paid to its officers and employees, which quoted resolution provided should be charged as investment expenses. The amounts of the deductions are set out in findings 3, 6, 9, and 12.

16. The percentages of the salaries of the officers of plaintiff, which the resolution directed to be charged to the investment department, represent estimates arrived at by such officers based upon a careful consideration of the duties theretofore performed by them and which they estimated would be performed in the future. The respective general officers and employees mentioned in the resolution of November 22, 1929, devoted at least as much of their time to the investment department of the plaintiff's business for the respective years involved herein as the percentages set out in the resolution.

17. The percentages of the salaries of the cashiers, which the resolution directed to be charged to the investment department, represent estimates arrived at by the supervising officers in charge of such cashiers based upon a careful consideration of the duties theretofore performed by the cashiers and which they estimated would be performed in the future. It is stipulated that, if called upon, the respective supervising officers of cashiers would testify under oath that the cashiers devoted at least as much of their time to the investment branch of plaintiff's business for the respective years involved as the percentages set out in the foregoing resolution. There is in evidence as a part of the stipulation of facts a statement showing the cash transactions by plaintiff's branch offices in the underwriting and investment departments, respectively, for 1931 and 1932. This statement is made a part hereof by reference. The approximate percentages of cash transactions relating to the underwriting and investment departments for 1931 and 1932, as shown in this statement, apply to the year 1930.

18. Plaintiff issues various standard forms of life insurance policies, such as Straight Life, Twenty Payment Life, Endowment, etc., some of which also include provisions for

total and permanent disability benefits and accidental death benefits. On each policy covering combined life, health, and accident insurance, the total premium shown on the face of such policy includes: (1) the premium paid for the life-insurance coverage; (2) the premium paid for the total and permanent disability insurance coverage; and (3) the premium paid for the accident insurance coverage. The premium paid for the total and permanent disability coverage and the premium paid for the accident insurance coverage are stated separately elsewhere in the policy.

The terms of such policy are—

(1) The cancellation or the termination of the life insurance automatically cancels or terminates the disability and/or the accident insurance.

(2) The policyholder may discontinue the disability and/or the accident insurance at any premium-paying date without canceling the life insurance and without affecting the life insurance premium. In such event, the total premium shown on the face of the policy would be reduced by the amount of the premium for disability insurance and/or the amount of the premium for accident insurance specified in the policy.

(3) The disability and accident benefits are not included in any paid-up term insurance, or other paid-up benefits granted upon the surrender or lapse of the policy; nor does any reserve held on account thereof enter into the amount of the reserve held on account of the life insurance covered by the policy, or the surrender, cash, or loan value shown in the "Table of Loan and Nonforfeiture Values."

19. A sample combined life, health, and accident insurance policy issued on May 1, 1932, to John Doe, at age 35, for $1,000, the same being nonparticipating, endowment at age 85, premiums payable for 20 years, and containing total and permanent disability and accidental death benefits, is in evidence as exhibit A and is made a part hereof by reference. The total annual premium for the combined life, health, and accident insurance is $36.30 as shown on the first page of said sample policy. The annual premium for total and permanent disability benefits is $4.31, and the annual premium for accidental death benefits is $2.00 as shown on

page 6 of such sample policy. Page 6 thereof also contains the usual provisions pertaining to total and permanent disability benefits and accidental death benefits, respectively.

20. Plaintiff issues its life insurance contracts and its combined life and disability insurance contracts on what is commonly known as the level premium plan; that is, the insured pays during the early years an annual premium in excess of the current cost of such insurance. The excess amount of such premium is devoted to the creation of a reserve, which, with accumulated interest at the assumed rate, enables such insurance to be maintained in later years, when the stipulated level premium would be insufficient to meet the current cost of such insurance on the level premium plan. The plaintiff creates and maintains a reserve out of the premiums received for the life insurance coverage, and also creates and maintains a separate reserve out of the premiums received for the total and permanent disability benefits coverage, as hereinafter referred to.

21. In respect of any policy in force which also provided for disability and/or accidental death benefits, plaintiff at all times set up and maintained a life reserve in the same manner as if the policy had been issued without such disability and/or accidental death provisions. For 1929 to 1932, inclusive, plaintiff's outstanding assurance obligations applicable to life insurance were valued upon the basis of the American Experience Table of Mortality, with interest at 3½ per centum, as required by the laws of the State of Washington, and the rules and regulations of the Insurance Commissioner of said State, and also as required by the laws of other states in which plaintiff did business, and it maintained reserves therefor as thus calculated. Plaintiff deducted 4 per centum of the mean of such reserve funds held by it at the beginning and end of the taxable years 1929, 1930, and 1931, and 3¾ per centum of the mean of such reserves held by it at the beginning and end of the taxable year 1932. The Commissioner allowed these deductions for the respective years above mentioned, and there is no controversy in this suit with respect thereto. Reserves for accidental death benefits are not in controversy in this case.

22. In respect of any combined life, health, and accident insurance policies in force, in addition to its reserves with respect to the life insurance coverage, plaintiff for 1929 to 1932, inclusive, set up and maintained, out of the total and permanent disability premiums, reserves with respect to the total and permanent disability benefits covered by said policies, computed as hereinafter stated, and commonly known as Reserve for Total and Permanent Disability Benefits, Active Lives.

In calculating the amount of the premium charged for such total and permanent disability insurance, the following factors are taken into consideration: (1) the rate of disability, (2) the rate of mortality, (3) the rate of interest, and (4) the rate of expense. The first three, the rate of disability, the rate of mortality, and the rate of interest, determine the amount of the net disability premium.

The net disability premium is that amount which (in connection with a given number of lives) will be exactly sufficient to pay all disability claims of the group, provided deaths take place and disability occurs according to the adopted combined mortality and disability table (usually Hunter's Combined Table of Mortality and Disability) and the net disability premiums are invested immediately at the rate of interest assumed (usually 3 per centum to 3½ per centum compound interest).

The fourth element, namely, expense or loading, is the amount added to the net disability premium necessary to take care of the underwriting expenses of the company, such as agents' commissions, cost of collecting premiums, settlement of disability claims, overhead expenses pertaining to underwriting, etc., with respect to the total and permanent disability coverage in the policies, and which are not reflected in the basic assumptions as to disability, mortality, and interest.

For a given number of lives, each of the same age at the beginning of any year, in determining the rate of disability for the group or for a unit thereof, there must be taken into consideration at least four elements:

1. The number of persons who would be ineligible or incapable of securing disability insurance;

2. The number who might obtain disability insurance, but die before becoming totally and permanently disabled;

3. The number who might obtain disability insurance and become totally or permanently disabled and live to receive disability benefits during the entire period of their expectancy;

4. The number who might obtain disability insurance and become totally and permanently disabled but who might die or recover prior to the expiration of their expectancy.

23. For the taxable years 1929 to 1932, inclusive, plaintiff credited to its Reserve for Total and Permanent Disability Benefits, Active Lives, the necessary portion of the net disability premiums charged for disability coverage. This reserve relates to outstanding disability insurance in force on which total and permanent disability has not occurred. The following gives the mean of plaintiff's Reserves for Total and Permanent Disability Benefits, Active Lives, held at the beginning and end of the taxable years involved:

1929	$78, 562. 76
1930	65, 871. 14
1931	68, 593. 97
1932	90, 725. 50

Plaintiff's Reserve for Total and Permanent Disability Benefits, Active Lives, was computed in accordance with standard combined mortality and disability tables with interest rates as required by the law of the State of Washington and/or by the rules and regulations of the Insurance Commissioner of said State, and also as required by the laws of other states in which plaintiff did business. The plaintiff deducted 4 per centum of the mean of such Reserves for Total and Permanent Disability Benefits, Active Lives, held by it at the beginning and end of the taxable years 1929 to 1931, inclusive, and 3¾ per centum of the mean of such Reserve for Total and Permanent Disability Benefits, Active Lives, held by it at the beginning and end of the taxable year 1932. The amounts of these deductions and the Commissioner's action with respect thereto are referred to in findings 3 (c), 6 (b), 9 (c), and 12 (c), respectively.

24. If, as, and when a person carrying disability insurance becomes totally and permanently disabled, plaintiff

transfers a certain amount, computed in the manner hereinafter described, from the Reserve for Total and Permanent Disability Benefits, Active Lives, to another reserve commonly called Reserve for Total and Permanent Disability Benefits, Disabled Lives. The amount so transferred is calculated upon the basis of selected tables of probabilities of length of disability and expected benefits (such as Hunter's Disabled Lives Mortality Table), plus an assumed rate of interest (usually 3½ per centum compound interest). The calculation also takes into consideration the mortality element. At the time of the happening of such contingency, it is not possible to determine definitely the amount of the disability benefits which the Company (plaintiff) shall be required to pay. This is due to the indefiniteness of the period during which the Company will be called upon to pay disability benefits, as the disability payments cease upon the death of such disabled person or upon the discontinuance of his disability.

25. The following gives the mean of plaintiff's Reserves for Total and Permanent Disability Benefits, Disabled Lives, held at the beginning and end of the taxable years involved:

1929	$60, 994. 28
1930	95, 432. 05
1931	123, 439. 49
1932	131, 206. 50

These Reserves for Total and Permanent Disability Benefits, Disabled Lives, were computed in accordance with standard combined mortality and disability tables for disabled lives, with interest rates as required by the law of the State of Washington, and/or the rules and regulations of the Insurance Commissioner of said State, and also as required by the laws of other states in which plaintiff did business and/or the rules and regulations of the Insurance Commissioners of said other states. Plaintiff deducted 4 per centum of the mean of the Reserves for Total and Permanent Disability Benefits, Disabled Lives, held by it at the beginning and end of the taxable years 1929 to 1931, inclusive, and 3¾ per centum of the mean of the Reserves for Total and Permanent Disability Benefits, Disabled Lives, held by it at the beginning and end of the taxable year

1932. The amounts of these deductions and the Commissioner's action with respect thereto are referred to in findings 3 (c), 6 (b), 9 (b), and 12 (b), respectively.

26. April 22, 1933, plaintiff filed its claims for 1929 and 1930, in which it asked for the refund of $1,894.89 and $3,196.89 for these years respectively, together with interest on the ground that it was entitled to the deduction from gross income of the amounts of $17,149.92 and $21,492.21 as investment expenses for the years, respectively, in the computation of its income tax liabilities. These claims were rejected by the Commissioner on October 25, 1935.

27. October 12, 1933, plaintiff filed its claim in which it asked for the refund of $3,619.16, with interest, for 1931, upon the ground that it was entitled to a deduction from gross income of the amount of $24,124.61 as investment expenses, a deduction on account of depreciation in the amount of $4,275.10, and other deductions not material here.

October 9, 1935, plaintiff filed its claim in which it asked for the refund of $1,333.24 for 1931, with interest, upon the ground that it was entitled to a deduction of $11,110.36 on account of depreciation. The claim for refund for $3,619.16 was rejected October 25, 1935, and the claim for $1,333.24 was rejected January 19, 1937.

28. June 24, 1935, plaintiff filed its claim in which it asked for the refund of $3,662.22, with interest, for 1932, upon the ground that it was entitled to a deduction from gross income of $26,634.31 as investment expenses.

October 29, 1935, plaintiff filed a claim in which it asked for the refund of $1,728.62, and interest, for 1932, upon the ground that it was entitled to a deduction of $12,571.82 on account of depreciation.

The Commissioner rejected the claim for $3,662.22 on November 26, 1935, and the claim for $1,728.62 on January 19, 1937.

29. In rejecting the refund claims for 1929, 1930, and 1931, the Commissioner held and determined as follows:

> With respect to issue (3), that the allocation of salaries and counsel fees made in accordance with a resolution of the Board of Trustees was a reasonable division of these expenditures; that they became a part of the

investment expense, and that the limitation provided in section 203 (a) (5) of the Revenue Act of 1928 does not apply, the Bureau holds that the salaries of the president and treasurer and legal expenses of the company are expenses of a general nature that cover all branches of the business; therefore, an allocation of a portion of this general expense would necessitate the application of the limitation as provided in the section and Act referred to above.

In rejecting plaintiff's claim for refund for 1932, the Commissioner held and determined as follows:

> Your claim is based on the contention that the allocation of salaries and counsel fees made in accordance with a resolution of the Board of Trustees was a reasonable division of these expenditures; that they became a part of the investment expense, and that the limitation provided in Section 203 (a) (5) of the Revenue Act of 1932 does not apply.
>
> The Bureau holds that the salaries of the president and treasurer and legal expenses of the company are expenses of a general nature that cover all branches of the business; therefore, an allocation of a portion of this general expense would necessitate the application of the limitation as provided in the Section and Act referred to above.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The first question involves a construction of section 203 (a) (5), Revenue Act of 1928 (45 Stat. 791, 842), which relates to the deduction allowable to a life insurance company in respect of investment expenses. This section is in the following language: "In the case of a life insurance company the term 'net income' means the gross income less * * * (5) Investment expenses paid during the taxable year: *Provided*, That if any general expenses are in part assigned to or included in the investment expenses, the total deduction under this paragraph shall not exceed one-fourth of 1 per centum of the book value of the mean of the invested assets held at the beginning and end of the taxable year."

Opinion of the Court

The gross income of a life insurance company consists only of "the gross amount of income received during the taxable year from interest, dividends, and rents," that is, investment income. Six specific deductions are allowed, among which is the deduction here involved. Two additional deductions are conditionally allowed under sec. 203 (b). A specific exemption is provided. A life insurance company is not taxable upon its general income from premium receipts or on gain or profit from sale of property.

As shown by the findings, the plaintiff, by a resolution adopted in 1929, undertook to apportion the salaries paid to its general officers and certain general employees as between the underwriting and the investment departments of its business and to include as a direct investment expense an amount ranging from 25 per centum to 80 per centum of such salaries. The amounts so apportioned to and included in the investment expenses, together with all actual and direct investment expenses, were claimed as deductions from gross income for 1929 and subsequent years. The salaries of such officers and cashiers were for services performed and expected to be performed; and such services related to all departments of plaintiff's business, that is, to both the investment and underwriting departments. The percentages of such salaries which the resolution directed be charged to the investment department represented estimates arrived at by such officers, and in the case of the cashiers by estimates arrived at by the supervising officers in charge of such cashiers. The direct investment expenses, that is, the actual expenses about which there is no controversy, which were wholly incurred and paid in the investment department, exceeded an amount computed upon the basis of one-fourth of 1 per centum of the book value of the mean of plaintiff's invested assets.

The case of *Sun Life Insurance Company of America* v. *United States*, 81 C. Cls. 892, involved a deduction under section 203 (a) (5). The question of the proper construction of this section and the extent of the deduction for investment expenses which a life insurance company may take thereunder has been reargued in this case. In the prior case of *Sun Life Insurance Company*, *supra*, the history, purpose,

and meaning of the section in its relation to the special plan for the taxation of life insurance companies and the relation of the section to the business practices of such companies under the statutes of many states concerning investment expenses were not fully briefed and argued. In view of the facts here disclosed and also in view of important considerations bearing upon the proper interpretation of the section not heretofore considered and discussed by the court, which are now pressed upon our attention with an earnestness and fullness of argument which they have not heretofore received, we deem the occasion an appropriate one to re-examine the whole subject.

In its returns for each of the years involved, plaintiff deducted from gross income as investment expenses all amounts charged in the investment department representing direct and actual investment expenses wholly incurred and paid in that department, and, in addition, the amounts on account of officers' and cashiers' salaries apportioned to and included in investment expenses in accordance with the resolution. The Commissioner of Internal Revenue determined and allowed the expenses directly and entirely incurred and paid in the investment department, and, inasmuch as these actual investment expenses exceeded one-fourth of 1 per centum of the mean of the book value of plaintiff's invested assets at the beginning and end of each taxable year, he excluded and refused to allow as a part of the deduction that part of the salaries of general officers and cashiers assigned to and included in investment expenses.

Plaintiff contends that this action was contrary to the provisions of section 203 (a) (5), *supra.* It insists that when a taxpayer makes a determination or when it can submit evidence to show that a certain portion of the time of general officers or employees and a certain percentage of the salaries paid to them for services rendered in all departments of the business reasonably relate to services performed and expenses incurred in the maintenance and operation of the investment department of the business, such percentage of the total salaries paid may, under the section mentioned, be included in investment expenses and deducted without limitation from investment income for the reason

that in such circumstances the portion so assigned to and included in the investment department becomes a direct and actual investment expense.

Plaintiff's position, in substance, is that the term "general expenses" as used in the statute refers specifically and only to those expenses which are *not* susceptible of division and allocation to the investment and underwriting departments and are incurred for and in behalf of both. We think this position does not take into consideration the fundamental distinction which exists in fact and is observed in the taxing statutes between general expenses and investment expenses. With respect to the former, a part thereof may be susceptible of reasonable ascertainment and fairly chargeable against investment income and this was recognized and permitted by Congress, as shown by the Committee Reports, to the extent of one-fourth of 1 per centum of the book value of the mean of the invested assets. But, with respect to the latter, no question of division or allocation exists and Congress permitted them to be deducted without limitation. The first part of the section allowing the deduction of *investment expenses* paid and the proviso excluding all *general expenses* in excess of a specified amount are to be read and construed together. In view of facts and circumstances which now appear, we think the inclusion of the first without limit and the exclusion of the second in excess of the specified limitation cannot be regarded the same as the inclusion without limit of all of one and a part of the other. And we think also it is of no controlling importance that the officers of the corporation in their judgment make an allocation of general salaries between the Investment and Underwriting Departments. In the circumstances an interpretation which would permit this to be done would require an unauthorized interpolation. The fact that general expenses may be reasonably susceptible of apportionment does not take them out of the class of general expenses within the meaning of the proviso. When so apportioned, either before or after they are incurred, the parts assigned are still impressed with the character of the services or matters in respect of which they are incurred.

Opinion of the Court

We are therefore of opinion that the additional deductions here claimed cannot be sustained under the language and intent of section 203 (a) (5) when that section is considered in the light of the history and reasons for the adoption in 1921 of the special plan for taxing the limited income of life insurance companies. Prior to the enactment of the Revenue Act of 1921, approved November 21, 1921, life insurance companies were by definition included within the term "corporation" and were taxable as ordinary corporations, their gross income, including not only their investment income—that is, their income from interest, dividends, and rents—but also their total premium receipts and all other gains and profits from sales of property.[1] This original plan of taxation, through the inclusion of premium receipts and the allowance of all deductions generally allowed corporations and, in addition, policy claims accrued and paid, etc., was generally unsatisfactory and was productive of almost constant administrative controversy and litigation. As a result the life insurance companies, through the Association of Life Insurance Presidents, proposed to Congress a new plan for the taxation of life insurance companies in connection with the consideration by Congress of the Revenue Bill of 1918.[2] In a written document filed with the Ways and Means Committee at the time the Revenue Bill of 1918 was being considered, the Association of Life Insurance Presidents said, among other things: "Although only a minor proportion of the premiums received by the insurance companies constitutes true income, the greater part being the policyholders' contributions toward current losses and to permanent capital, the entire premium income is included in gross income under the Income Tax Law. This departure from principle is, however, rendered innocuous through deductions expressly allowed by the statute." The plan submitted by the insurance companies proposed to place life insurance com-

[1] Corporation Excise Tax Act of 1909, 36 Stat. 11, 112; Revenue Act of 1913, 38 Stat. 114, 172, 173; Revenue Act of 1916, 39 Stat. 756, 765–768; Revenue Act of 1918, 40 Stat. 1057, 1075–1079.

[2] Hearings before the Committee on Ways and Means, H. R. 12863, 65th Cong., 2d Sess., on the proposed Revenue Act of 1918, Pt. 1, p. 811.

panies in a special class for the purpose of Federal taxation, and to change the basis of tax theretofore existing so as to include in gross income only the investment income of the companies consisting solely of interest, dividends, and rents, the deductions proposed in connection with this plan being expressly limited to those directly relating to the production of investment income.[3] The House did not adopt the proposed plan in the Revenue Bill of 1918. However, the Senate Finance Committee recommended in the 1918 Revenue Bill the plan proposed, which plan was later adopted and included as law in the Revenue Act of 1921. The amendment proposed by the insurance companies which was adopted and recommended to the Senate by the Finance Committee in the Revenue Bill of 1918, insofar as it related to the deduction from gross income for investment expenses, was as follows: "Section 246. (a) That in the case of an insurance company taxable under section 245 the term 'net income' means the gross income less * * * (4) Investment expenses during the taxable year not exceeding one-fourth of 1 per centum of the mean of the invested assets." In presenting the bill, Senator Simmons, chairman of the Finance Committee, stated that it had been framed after consultation with many representatives of the life insurance companies.[4]

The plan proposed for the taxation of life insurance companies was approved and adopted by the Senate, but was thereafter abandoned in conference.

The above limitation of one-fourth of 1 per centum, which had been proposed by the life insurance companies themselves, on the deduction "for investment expenses" was exactly the limitation which had long been in force and effect in the State of New York, as well as in various other states, under which life insurance companies in making their Annual Statements to the Insurance Departments of the various states had been limited by law to an arbitrary deduction for investment expenses not exceeding one-fourth of 1 per centum of the mean of their invested assets. Section 33

[3] Senate Rep. 617, 65th Cong., 3rd Sess., p. 9.
[4] Cong. Rec., Vol. 57, Pt. I, p. 254.

of the Laws of New York (1906), ch. 326, which added section 97, provides as follows:

> Limitation of Expenses, * * *. No such corporation (domestic life insurance corporation) shall make or incur any expense or permit any expense to be made or incurred upon its behalf or under any agreement with it, except actual investment expenses (not exceeding one-fourth of 1 per centum of the mean invested assets) * * *.

It will thus be seen that the provision with reference to the deduction for investment expenses in the Revenue Bill of 1918 suggested by the life insurance companies and adopted by the Senate was not new, and that the limitation on expenses which the companies could take against investment income in all circumstances was one-fourth of 1 per centum of the mean of invested assets. There was no provision for the allowance of actual investment expenses beyond that limitation. The percentage specified was then deemed to be adequate by the insurance companies themselves, the State Insurance Departments, and the Senate.

The question of how life insurance companies should be treated for the purpose of Federal taxation again came before Congress in the consideration of the Revenue Bill of 1921. The life insurance companies through the Association of Life Insurance Presidents [5] renewed efforts to obtain a separate classification for purposes of Federal taxation. The Revenue Bill of 1921 as introduced in the House contained the plan for taxing life insurance companies which had theretofore been adopted by the Senate in 1918. (H. Rep. No. 350, 67th Cong., 1st Sess., p. 14). When the 1921 Revenue Bill was before the Senate Finance Committee a representative of the life insurance companies stated that "all the life insurance companies are behind that scheme and are

[5] At the Annual Meeting of Life Insurance Presidents, December 1920, it was stated in a paper read by Mr. E. E. Rhodes, Vice President of the Mutual Benefit Life Insurance Company, on "Federal Taxation of Life Insurance" that the basis of the income tax was unsatisfactory both to the companies and to the Government, and that a plan similar to that embodied in the Senate Amendment to the 1918 bill should be adopted. Proceedings of the Fourteenth Annual Meeting, pp. 141, 143–145.

satisfied with it." [6] Thereafter, in due course, the Congress after much consideration and consultation with the representatives of the life insurance companies, and with the approval of at least most of the life insurance companies, finally enacted the Revenue Act of 1921, section 245 (a) (5) (42 Stat. 227, 262) of which was the same as the provisions of section 203 (a) (5) now under consideration.[7]

At this point it should be noted that the provision with respect to the deduction allowed for investment expenses as finally adopted in the 1921 Act is more liberal as to the amount which may be deducted for investment expenses under certain circumstances than was the original provision proposed in connection with the Revenue Bill of 1918, in that life insurance companies are allowed all actual investment expenses, whereas, under state law and the provision proposed by the life insurance companies and adopted by the Senate in connection with the 1918 Revenue Bill, no investment expenses in any circumstances were allowable beyond the limitation of one-fourth of 1 per centum of the mean of the invested assets. But this liberalization was not without limitation and such liberalization applied only in cases where the company did not include any general expenses in its actual investment expenses. In order to control the deduction to be taken against the limited income which was being taxed, and thus avoid uncertainty in respect of the net income of life insurance companies that it chose to tax, Congress limited the deduction to one-fourth of 1 per centum of the book value of the mean of the invested assets "if any general expenses are assigned to or included in investment expenses." The evident purpose and reason for this more liberal provision with reference to the deduction of actual investment expenses, regardless of amount (but subject to the original limitation of one-fourth

[6] Hearings before the Senate Finance Committee, 67th Cong., 1st Sess., on H. R. 8245, September 1–October 1, 1921, p. 84. See also S. Rep. No. 275, 67th Cong., 1st Sess., p. 20.

[7] See sections 242–245, 1921 Act, for the original plan specially taxing life insurance companies, which plan, so far as material here, has remained the same in all subsequent revenue statutes.

of 1 per centum if any expenses of a general character were assigned or included), was due to the fact that some of the newer or smaller life insurance companies (principally the mid-western companies, as shown in the case at bar), where the nature of the companies' investments required field work, invested their funds largely in farm loan mortgages which produced higher rates of interest income and involved also proportionately higher expenses in connection therewith, such as expenses for salaried field representatives for procuring and servicing such loans. The investments of the older and eastern companies were more largely in stocks and bonds which produced a lower interest income and, correspondingly, lower expenses in connection therewith because of such investments being made in a more direct manner. In these circumstances it was known that the actual investment expenses, that is, the expenses directly and entirely incurred in the investment department alone, of the smaller companies might exceed one-fourth of 1 per centum of the book value of the mean of their invested assets, but that in the case of the larger companies, which always hold very large amounts of invested assets, the limitation originally proposed by the life insurance companies would always be sufficiently adequate to cover their actual investment expenses.[8] Experience has shown that this comparison is correct for the reason that the question with reference to the right to apportion a part of the general expenses to investment expenses, in order to obtain a deduction in excess of one-fourth of 1 per centum of the mean of the invested assets, has only arisen in court in two cases, other than the present case, during the seventeen years the provision has been in effect.

In the instant case, plaintiff's direct and actual investment expenses for 1929, which were allowed by the Commissioner of Internal Revenue and about which there is no dispute, amounted to approximately $37,000, whereas one-fourth of

[8] The Treasury Department in regulations and practice has uniformly permitted deductions without limitation of direct and actual investment expenses and has uniformly held life insurance companies to the limitation of one-fourth of 1 per centum, when, by whatever method or plan employed, any company assigned to or included in its investment expenses any expense of a general nature, such as general officers' salaries, etc.

1 per centum of the mean of the book value of plaintiff's invested assets at the beginning and end of that taxable year was only approximately $21,000. For 1930 the Commissioner allowed a deduction of actual investment expenses of $42,000 as against such a limitation of $23,000; for 1931 he allowed a deduction of $41,000 as against a limitation of $24,000, and for 1932 a deduction of $37,000 as against a limitation of $24,000. Plaintiff seeks to augment the deductions allowed by the Commissioner for actual investment expenses wholly incurred in that department by an amount in excess of $17,000 for 1929 on account of the allocation to and inclusion in such investment expenses of a portion of the general officers' and employees' salaries, and of more than $21,000 for 1930; $24,000 for 1931, and $26,000 for 1932. These figures appear to illustrate the reason why Congress deemed it advisable to limit the deduction on account of investment expenses to one-fourth of 1 per centum of the mean of the invested assets when the actual investment expenses wholly incurred and paid in maintaining and operating the investment department did not equal or exceed the limitation. Another reason for denying a deduction of any part of a general expense in excess of the limitation was that general income, such as underwriting income and gains and profits on the sale of assets, was being excluded and exempted from taxation. Inasmuch as only the income from the investment department was being made subject to the tax, it would seem that Congress intended that only the actual investment expenses should be allowed when a deduction in excess of one-fourth of 1 per centum was to be permitted. If this were not true the proviso would seem to have no purpose and its provisions would be rendered of no value. It is well established that Congress may condition, limit, or deny deductions from gross income in order to arrive at the net income that it chooses to tax. *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301; *Helvering* v. *Independent Life Insurance Co.*, 292 U. S. 371.

The reason for exempting premium income of a life insurance company from taxation was because the greater portion, that is, the net premiums paid and also the reserve built up and maintained therefrom with interest, really belongs to the policyholders. In the total of each annual

premium paid, there is always included an amount which, upon the basis of experience, will be sufficient to pay the expenses of the company. Finding 22. *New York Life Insurance Co.* v. *Edwards*, 8 Fed. (2d) 851, 853. In that case the court said:

> * * * But the net or mathematical premium is not the full amount each member must pay into a going concern, because it contains no provision for expense of management and unforeseen contingencies, such as excess mortality, diminished interest, investment losses, increased taxation, and the like. Therefore, to provide for these, there is added to the net or mathematical premium a sum technically called "loading." The net or mathematical premium plus the loading constitutes the company's table rate of premium or level premium, and is the estimated sum named in the policy as premium to be paid in advance and adjusted to cost when cost is known, and is the maximum sum which the company can ever require the insured to pay.

Inasmuch, therefore, as premium income was not being taxed and the untaxed premiums contained amounts for payment of the company's expenses, including all its general expenses, the Congress deemed it necessary to make specific provision as to the maximum deduction allowable against the taxable investment income so as to prevent the apportionment and the inclusion of the general expenses in this deduction. When investment expenses wholly incurred in that department do not equal or exceed the limitation specified, the amount of the deduction is entirely arbitrary; however, as stated in the reports of the Congressional Committees,[9] it was considered that adequate provision had been made for "suitable deductions for expenses fairly chargeable against such investment income."

It is well known, and is admitted in this case, that the expenses of a life insurance company generally fall into three classes, to-wit, underwriting expenses, which are those expenses directly relating to and wholly incurred in that department; investment expenses, which are expenses directly relating to and entirely incurred in the maintenance

[9] H. Rep. No. 350, 67th Cong., 1st Sess., p. 14; Senate Rep. No. 275, 67th Cong., 1st Sess., p. 20.

and operation of the investment department; and general expenses, which include, and can only include, all expenses which are not definitely and entirely either investment or underwriting expenses. The last-mentioned class constitutes the only class of expenses to which the *proviso* of section 203 (a) (5) could relate. The additional deductions on account of salaries of general officers and employees claimed in this case are a part of this class of expenses as they relate both to the investment and the underwriting departments. The taxpayer in this and other cases sought to include a portion thereof in the deduction for actual expenses in excess of the limitation of one-fourth of 1 per centum by submitting evidence to show that the services and matters for which the expenses were paid had some relation to the investment department and that an apportionment and allocation of a part of such expenses could be made to the investment department on the basis of a reasonable value for such services or other matters to the investment department. Such apportionments and allocations involve approximations, estimates, or guesses which were a feature of administration which, it appears, Congress desired by the *proviso* to avoid.

In connection with plaintiff's contention that the term "investment expenses" means, and was intended to mean, any expense of a general nature which might be susceptible of reasonable apportionment and allocation as between the underwriting department and the investment department of the business, reference may be made to the discussion of this provision when it was before the Senate Finance Committee.[10] At that time Dr. Adams, who was the representative of the Treasury Department, in discussing the section here under consideration with the committee, pointed out that the purpose of this section relating to deductions for investment expenses with the limitation mentioned was to permit those life insurance companies which "very vigorously and exactly allocate or set aside their investment expenses" to deduct such investment expenses and that companies which did not keep their investment expenses accu-

[10] Hearings before the Senate Committee on Finance, 67th Congress, 1st Sess., on the Revenue Bill of 1921. H. Rep. 8245, pp. 89–90.

rately and exactly segregated from all other expenses would not be permitted to take a deduction in excess of one-fourth of 1 per centum of the book value of the mean of the invested assets. He was questioned by the chairman of the committee concerning the limitation of one-fourth of 1 per centum, to which he replied that such limitation was a check then imposed upon life insurance companies by law; that "they are quite habituated to it and the practice has shown that it apparently is also quite accurate. If they can allocate and say absolutely just what their investment expenses have been, they are permitted to take them. If they do not go to that trouble, they are not permitted to take more than one-fourth of 1 per centum of the book value of the mean of the invested assets." This explanation when considered in the light of the language of the section shows that the Treasury Department was placing upon the section a construction which would permit a taxpayer to deduct *more* than one-fourth of 1 per centum of the book value of the mean of the invested assets *only* when the taxpayer accurately allocated and could say *absolutely* just what its actual investment expenses had been, and that if such taxpayer did not accurately segregate or allocate its actual investment expenses, that is, those expenses relating directly and entirely to the investment department, it could not have a deduction greater than one-fourth of 1 per centum. In view of the facts and circumstances disclosed by this record, we think this is the correct interpretation of the section. To allocate and say absolutely just what their investment expenses have been precludes the idea (in view of the language of the proviso) of a division of general expenses and the assignment or inclusion of a portion thereof as an "investment expense." If expenses, such as salaries of general officers and employees, which are not entirely incurred and paid in the maintenance and operation of the investment department, may be divided and assigned or allocated in part to the investment department, there would no longer be any "general expense" to which the proviso could apply for substantially all expenses of the company would by that method of division and assignment become either a direct investment expense or a direct underwriting expense, and the sums as-

signed to and included in the investment department deductible without any limitation whatever.[11] The proviso would then be rendered of little, if any effect.

The *proviso* of the section under consideration seems further to have contemplated that in some cases the actual investment expenses would not equal one-fourth of 1 per centum of the mean of invested assets and that certain general expenses of the insurance company might, with some degree of reasonableness, be said to have some direct relationship to the investment department and also to be reasonably susceptible of division and assignment in part to the different departments of the business. The *proviso* was therefore so worded as to make it plain that while this was not being prohibited from a bookkeeping or business standpoint the deduction allowable would be limited to the amount specified if it should be found that the actual investment expenses, exclusive of the portions of any general expenses included, were less than an amount computed on the basis of one-fourth of 1 per centum of the book value of the mean of the invested assets. In other words, the term "investment expenses" when considered in connection with the term "general expenses" in the proviso can only mean expenses directly and entirely relating to the investment department, for the language of the proviso permits a taxpayer to include in its investment expenses general expenses in whole or in part to an amount which when combined with the actual investment expenses does not exceed one-fourth of 1 per centum of the mean of invested assets. Therefore, under the strict letter of the statute, and no reason appearing to require the conclusion that the intention of Congress

[11] Among other expenses of a general nature which could with equal facility be apportioned and assigned in part to the investment department, the following might be mentioned: (1) General advertising; (2) salaries of legislative counsel, public relations counsel, and advertising manager; (3) costs of publishing and mailing annual reports and financial statements; (4) sums paid to inactive general employees or pensioners and contributions to pension funds; (5) traveling expenses of company officials attending agency and national conventions; (6) dues and assessments paid to certain bureaus and associations; (7) costs of books, newspapers, and periodicals not used exclusively in either the investment or underwriting departments; (8) public liability insurance premiums; (9) charitable donations and contributions; and (10) license fees paid to various states for the privilege of doing business therein.

differed from the ordinary meaning of the language used, the plaintiff having assigned a portion of its general expenses to its investment expenses, and since its actual investment expenses allowed by the Commissioner exceeded one-fourth of 1 per centum of the book value of the mean of plaintiff's invested assets, no additional amount in respect of the allocation made by plaintiff can be allowed.

If the plaintiff in this case should be permitted to make a division of the salaries of the general officers and employees and to assign to and include in investment expenses the amounts which it seeks to include in this case, we would be forced under our interpretation to restrict the total allowance in each year for investment expenses to an amount which would be only slightly more than one-half of the amount which the Commissioner actually allowed for each year. The Commissioner's allowance in each year, although it exceeded one-fourth of 1 per centum of the mean of plaintiff's assets, was correct for the reason that he was able to allocate and say absolutely just what plaintiff's actual investment expenses had been. We are now of opinion that this construction of the provision under consideration conforms in every respect and in each class of cases to both the letter and the spirit of the statute and to the known facts out of which grew the special plan, of which the deduction for investment expenses is an important part, for the taxation of life insurance companies.

The cases of *Sun Life Insurance Company of America* v. *United States*, *supra*, and *Volunteer State Life Insurance Company* v. *Commissioner of Internal Revenue*, 27 B. T. A. 1149, cited and followed in the *Sun Life case*, did not consider and discuss the deduction under section 203 (a) (5) in the light of certain facts and circumstances which here appear and which we now think are controlling upon the question involved.

Plaintiff is therefore not entitled to an additional deduction on account of the salaries of officers and employees which the facts show were for services relating "to matters in all departments of plaintiff's business, that is, in both the investment and underwriting departments."

The second question is whether, in determining net income, a life insurance company is entitled to a deduction on account of reserves held for health and accident (casualty) insurance; that is, are casualty reserves to be treated and deducted as "reserves required by law" within the meaning of the provisions of the taxing act relating solely to life insurance companies. Reserves for accidental *death* benefits have been allowed and are not in controversy here—finding 20.

The provisions of the Revenue Act of 1928 pertinent to this question are as follows:

> SEC. 201. TAX ON LIFE INSURANCE COMPANIES.
>
> (a) DEFINITION.—When used in this title the term "life insurance company" means an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds.
>
> SEC. 202. GROSS INCOME OF LIFE INSURANCE COMPANIES.
>
> (a) In the case of a life insurance company the term "gross income" means the gross amount of income received during the taxable year from interest, dividends, and rents.
>
> SEC. 203. NET INCOME OF LIFE INSURANCE COMPANIES.
>
> (a) *General rule.*—In the case of a life insurance company the term "net income" means the gross income less * * *.
>
> (2) *Reserve funds.*—An amount equal to the excess, if any, over the deduction specified in paragraph (1) of this subsection [tax free interest] of 4 per centum of the mean of the reserve funds required by law and held at the beginning and end of the taxable year, plus (in case of life insurance companies issuing policies covering life, health, and accident insurance combined in one policy issued on the weekly premium payment plan, continuing for life and not subject to cancellation), 4 per centum of the mean of such reserve funds (not required by law) held at the beginning and end of the taxable year, as the Commissioner finds to be necessary for the protection of the holders of such policies only; * * *.

The corresponding provisions of the Revenue Act of 1932 are identical with the foregoing, except that subdivision

(2) of section 203 (a) provides for the use of a rate of 3¾ per centum of the mean of the reserve funds instead of 4 per centum in any case where the reserve funds are computed at an interest assumption rate lower than 4 per centum. (47 Stat. 169, 224.)

The facts show that in computing the deduction for each year at the percentage specified, plaintiff included the reserves held under health and accident insurance written by it. For 1929 and 1930 the Commissioner of Internal Revenue permitted plaintiff to include in its reserve fund, on which the deduction under section 203 (a) (2) of the Revenue Act of 1928 was computed, the reserves held by plaintiff for health and accident (casualty) insurance in the case of both "Active Lives" and "Disabled Lives," but for 1931 and 1932 he allowed such casualty reserves to be included only for "Active Lives" and excluded the reserves for "Disabled Lives." Plaintiff seeks to recover alleged overpayments for 1931 and 1932 on the ground that the health and accident reserves held by it in the case of "Disabled Lives" were properly to be included in determining the total of the "reserve funds required by law" within the meaning of the above-quoted sections, 201 (a) and 203 (a) (2).

The defendant, while not seeking an affirmative judgment, since the assessment of any additional tax for any of the four years involved is barred, contends here that the allowance of any reserve deduction on account of health and accident insurance, whether for "Active Lives" or "Disabled Lives," is erroneous. In other words, the defendant contends that under sections 201 (a) and 203 (a) (2), Acts of 1928 and 1932, the reserve to be used in determining the deduction to be allowed to *a Life Insurance Company* means the amount which is attributable to and represents the value of the life-insurance elements of the policy contracts and does not include casualty reserves. It is the position of defendant that only those reserves held under contracts involving life contingencies are deductible by a corporation taxable as a life insurance company.

It is agreed that plaintiff is in fact and in law a life insurance company and that it is taxable only under those pro-

visions of the statutes which relate exclusively to life insurance companies. As stated under the first issue, the provisions which impose the tax only upon investment income of such companies have been the same under all the revenue acts since, and including, the Revenue Act of 1921, and under these statutes a life insurance company is not taxable on underwriting income or on earned premiums, or gains or profits which it may realize on the sale or disposition of any of the numerous assets which it necessarily owns. For this reason the taxing acts do not permit deductions to life insurance companies upon the same basis as deductions are allowed to other classes of insurance companies or to corporations in general. The section under which the deductions on account of health and accident reserves here involved are claimed by plaintiff to be allowable provides for a deduction of an amount equal to 4 per centum of the mean of the reserve funds required by law to be held at the beginning and end of the taxable year. This provision relates exclusively to life insurance companies, either stock or mutual, and does not relate and is not to be found in the provisions of the statutes relating to the taxation of casualty insurance companies or to other classes of insurance. The provisions of section 203 (a) (2) are entirely unlike the provisions of section 208 (c) (1) (A) of the Revenue Acts of 1928 and 1932 permitting "Mutual Insurance Companies other than Life" to deduct the net addition required by law to reserve funds. Such companies are taxable upon premium received and all other income, and the deduction of the net addition to reserve funds is allowed in addition to the deductions specified in section 23.

The question here, therefore, is whether the term "reserve funds required by law" (sec. 203 (a) (2)), which relates to reserves of life insurance companies only, includes, when considered with section 201 (a), reserves held by a life insurance company on account of outstanding policies of health and accident insurance, that is, casualty insurance, as well as reserves held on account of outstanding life insurance policies. We are of opinion that reserves held under health and accident insurance contracts are not properly to be included in the reserve fund required by law to be held by a life insur-

ance company for the purpose of deduction from income for tax purposes.

The definition of a life insurance company as set forth in section 201 (a) quoted above was enacted for the purpose of taxing insurance companies according to the predominant kind of insurance issued by them. It was not necessary to define other insurance companies for the reason that the revenue acts treat them separately and classify them either as "Insurance Companies other than Life or Mutual," which includes a casualty insurance company (sec. 204, Act of 1928), or as "Mutual Insurance Companies other than Life" (sec. 208). The gross income of insurance companies taxable under sections 204 and 208 includes the combined gross amount derived during the taxable year from investment income, from underwriting income, and from gain from the sale or other disposition of property, less the deductions therein specified.

Basically the question whether the health and accident (casualty) reserves claimed by plaintiff are a part of its "reserve funds required by law" within the meaning of section 203 (a) (2) depends upon the question whether such health and accident reserves are to be included in the reserves for life insurance and annuity contracts for the purpose of determining whether an insurance company is a "life insurance company" within the meaning of section 201 (a) of the Revenue Act of 1928 for the purpose of taxation under sections 202 and 203. Both parties agree as to this. The first consideration, therefore, is directed to the comparative to be used in determining whether an insurance company is a "life insurance company." We are of opinion that since the purpose of the definition contained in section 201 (a) is one of classification, the test provided is the amount of reserve funds held for life insurance and annuity contracts as against the reserve funds of the company concerned which are held for health and accident insurance, and that the words "total reserve funds" used in that section mean the sum of the life insurance and annuity contract reserves and the health and accident, or casualty, reserves. This section was dealing only with technical insurance reserves, rather than with the total of such reserves plus reserves for pure liabilities. The purpose of the section

was to provide a simple rule to be applied in determining whether an insurance company which writes life insurance and annuity contracts, and, also, health and accident insurance, should be taxed under the special plan specified in sections 202 and 203 relating exclusively to life insurance companies, or whether such companies should be taxable under section 204.

Insurance companies issuing life insurance and annuity contracts may, and many do, write health and accident insurance. This is casualty insurance, and is the only kind of insurance other than life that a life insurance company writes or is permitted to write under the laws of the various states. The statutes of the State of Washington, the home state of plaintiff, classify health and accident insurance as casualty insurance, and also specifically provide that this is the only kind of insurance other than life that a life insurance company is permitted to issue.[13] For these reasons we think it is clear that the comparative in the definition stated by Congress under which an insurance company is to be classified either as life or as a casualty company is that existing between the reserves of such company for life insurance and annuity contracts and its health and accident reserves. When section 242 of the Revenue Act of 1921, which was the same as section 201 (a) here involved, was under consideration by the Finance Committee of the Senate[14] a representative of the Treasury Department was asked by the committee to "Explain that 50 per cent of its total reserve funds, and why take 50 per cent instead of some other figure?" to which Dr. T. S. Adams, representing the Treasury Department, replied "Some companies mix with their life business, accident and health insurance. It is not practicable for all companies to disassociate those businesses so that we have assumed [in drafting the bill which was then being considered by the committee] that if this accident and health business was more than 50 per cent of their business, as measured by their reserves, it could not be treated as a life insurance company. On the other hand,

[13] *Pierce's Code* (1929), Vol. 1, *Washington General Statutes*. Sections 2990 (83), 2991 (84), 2999 (92), and 3001 (94).

[14] Hearings before the Committee on Finance of the Senate, 67th Cong., 1st Sess. (H. R. 8245), pp. 92–93.

if their accident and health insurance were incidental and represented less than 50 per cent of their business we treated them as a life insurance company."

If the phrase "total reserve funds" at the end of section 201 (a) means the total of all the reserves for all classes of insurance written by the insurance company under consideration, the definition would, under plaintiff's contention, be rendered meaningless and every insurance company writing life insurance would be a life insurance company even though its casualty reserves constituted the largest proportion of all its insurance business. If the term "total reserve funds" refers to and includes the company's total *liabilities*, for which all state laws require insurance companies to hold reserves, the definition would be rendered useless.

The net value reserves of a life insurance company, whether or not it also writes health or accident insurance, always constitute the greater portion of its total liability reserves. This is true of any insurance company, whether life or casualty. This is disclosed by the published reports of "The New York State Insurance Department," which show that in all life insurance companies reporting in that state the net value reserves of such companies constitute approximately from 85 to 90 per centum of their total liabilities. These averages are also true in respect of plaintiff's net value reserves. While it does not report to the New York Insurance Department, since it does no business in that state, its annual statements are published in "Best's Life Insurance Reports," which show that plaintiff's net value reserves for all classes of insurance issued by it have always averaged about 90 per centum or more of its total net liabilities, that is, about the same as all other insurance companies doing the same class of insurance business. In these circumstances there would be no necessity for a classification upon the basis provided in that section since the reserves of an insurance company writing life insurance and annuity contracts, whether or not it also writes health or accident insurance, held on account of the net values of insurance contracts would never be less than 50 per centum of its total liabilities. The nature of the insurance business precludes that possibility.

Inasmuch as the comparative for determining whether an insurance company is taxable as a life insurance company under section 202, or as a casualty company under section 204, is the ratio between its life reserves and its casualty reserves, and, by this test, it being undisputed that plaintiff is a life insurance company, its tax is to be exclusively determined under the provisions relating to life insurance companies.

This brings us to the next phase of the question, which is whether casualty reserves, that is, the reserves for health and accident insurance issued by plaintiff, come within the provisions of section 203 (a) (2) which, as hereinbefore stated, allow a deduction to a life insurance company of an amount equal to 4 per centum of the mean of the reserve funds required by law to be held at the beginning and end of the taxable year.

Since the statute places life insurance companies in a special class and taxes them upon only a portion of the gross income as defined in cases of other classes of corporations and insurance companies, we are of opinion that Congress used the term "reserve funds" in section 203 (a) (2) in the same sense in which it was used in section 201 (a) just considered. In other words, when an insurance company has been classified as a life insurance company in accordance with section 201 (a), the reserves to be included under section 203 in determining the 4 per centum deduction are those reserves which are held by such company on account of its life insurance and annuity contracts. This excludes reserves for such casualty insurance as a life insurance company may write. Additional reasons which we think require the conclusion that casualty reserves are excluded in determining the reserve deduction allowable to a life insurance company are (1) that Congress placed such a company in a special class and taxed it upon only its investment income and that this classification and method of taxation were due to the fact that reserves for life insurance and annuity contracts really belong to the policyholders, and (2) that premiums paid on casualty insurance belong to the insurance company and the reserves required to be maintained therefor by state laws are, in effect, and from the

standpoint of Federal taxation, liability or solvency reserves because if the casualty, to which the health and accident contract relates, does not happen or if the policy should lapse or be canceled the company is never called upon to make any payment. This, we think, was the reason for taxing casualty companies in the manner specified in section 204. An insurance company incorporated as a casualty company does not write life insurance, although some life insurance companies write casualty insurance.

The meaning of the phrase "reserve funds required by law" as used in the taxing acts in its relation to a life insurance company has been decided in a number of cases. *Helvering* v. *Illinois Life Insurance Company*, 299 U. S. 88, 90, 91, involved deductions claimed for reserves held on account of the survivorship investment fund feature of certain life insurance policies, and the question was whether reserves for this feature of the policies were to be included in determining the allowable deduction. The court said at pages 90, 91:

> *The phrase "required by law" includes only reserves that directly pertain to life insurance.* Other reserves, even though required by state statutes regulatory of the business authorized to be carried on by life insurance companies, are not included. * * *
>
> Its [the life insurance company's] life insurance liability arises upon the death of the insured. Ascertainment of the reserves attributable to that liability involves consideration of the amount contributed to them out of premiums plus interest for a period estimated on the basis of mortality. The survivorship investment fund feature of these policies has no relation to life insurance risks. [Italics supplied.]

The case of *Continental Assurance Co., Inc.* v. *United States*, 79 C. Cls. 756, 765, involved deductions for reserves held for coupons attached to certain life insurance policies of a stock company, which were equivalent to dividends in the case of a Mutual Life Insurance Company, and the question was what reserves of a life insurance company are included in the term "reserve funds required by law." We held that the reserve contemplated in the taxing act is that fund which when added to the present value of future net premiums is equal to the present value of future death claims; that is, the mathematical equivalent of the obligation incurred by the

company to pay the sum insured at the death of the policy-holder, or upon the surrender and cancelation of the policy. The principle decided in that case was approved in *Helvering* v. *Inter-Mountain Life Insurance Company*, 294 U. S. 686, 690, in which the court held that "In life insurance the reserve means the amount, accumulated by the company out of premium payments, which is attributable to and represents the value of the life insurance elements of the policy contracts."

The facts in the case at bar show that plaintiff's reserves for health and accident insurance are not held on account of life insurance and that they are not of the same character as technical *life* insurance reserves. They do not include life contingencies. Such casualty reserves are calculated upon the basis of Tables of Probabilities as reserves for other classes of casualty risks are computed. These reserves are required by the law of Washington to be computed upon the net premium basis and they do not involve the element of life insurance as a liability. The life risk is the basis of life insurance reserves. Although the experience tables used in computing health and accident reserves take into consideration the mortality element, this is merely incidental and does not involve the element of life risk as in the case of life insurance. The purpose of considering the mortality element and the nature of the risk in casualty insurance is the opposite of that of the reserve for the life risk in a life insurance policy. The mortality element in a life policy requires the establishment of a reserve sufficient to meet the policy obligations at maturity; that is, at death. In the case of health and accident insurance death, instead of maturing the liability, terminates the risk with respect to the payment of liability for disability benefits. The health and accident reserve is never built up or maintained to provide for a life risk, inasmuch as there is no such risk which the company can ever be called upon to meet in health and accident insurance.

Plaintiff insists that the health and accident reserves here involved are deductible for the reasons that they are set up and maintained out of premiums, are calculated upon an experience table applicable to the nature of the risk,

and are held to meet contingent policy obligations at maturity. But under the scheme for taxing life insurance companies this is not controlling and does not render them of the same character as life reserves. All casualty reserves have these characteristics. But life insurance reserves, as hereinbefore mentioned, are, in effect, and always in the end, the property of the policyholder. This was the reason for the adoption of the special method of taxing life insurance companies. The holder of a life insurance policy may demand and receive the reserve which is shown in the table of loan and non-forfeiture value of the policy, and if the policy lapses before death a life insurance company must account to the insured for the full reserve value of the policy. This is not true of any other form of insurance and more particularly of casualty insurance involved in the case at bar. The net value of the health and accident policy is not increased by the reserves. They are never returnable in any amount to the policyholder if the policy lapses, is surrendered, or otherwise terminates. Moreover, the contingency for which such reserves are maintained may never happen. In that event the interest included in the reserve, and non-taxed, is released to the absolute use and benefit of the company. There is no provision in the statute relating to life insurance companies for the taxation of this interest element of the casualty reserves, when so released. This, we think, is the very basis of the definition, for if a life insurance company is to be taxed only upon its income from investments and not on its premium income, or from gains or profits generally, the Congress did not intend to allow such company a deduction in respect of premium income that belonged to it even though in respect of such premium income it *might* later be called upon to make some payment.

Why was a company which writes life and also casualty insurance made taxable as a life insurance company or a casualty company according to the amount of reserves maintained for each class of insurance? We think the answer is, that if the greater proportion of its business is life insurance it would be unfair to tax it upon its premium receipts and gains or profits, because the net premiums belong to the policyholders, whereas, if the larger proportion of the

business is casualty insurance, the company should be taxed under section 204 on its premium receipts and other income, because such premiums belong to the company, and the reserves for any payments which the company might be called upon to make would have no place for tax purposes in the plan of taxation since they are, from that point of view, in the nature of liability or solvency reserves. It is well settled that liability or solvency reserves are not deductible by the company taxable as a life insurance company. As above stated, if a company is taxed as a life insurance company and is permitted to deduct casualty reserves which it may never be called upon to use for the purpose of making any payments under its contracts, such company would be obtaining an undue advantage for the reason that a portion of the only income taxable under the provisions relating solely to life-insurance companies would entirely escape taxation to the extent that the health and accident policies otherwise might lapse, be canceled, or terminate by death. We think that Congress intended the reserve deductions to conform to the special plan for taxation of life insurance companies. The inclusion of reserves maintained out of premiums which belonged, when paid, to the company would not comport with the statutory plan.

Plaintiff contends, however, that if casualty reserves are to be excluded in any cases it was not the intention of the act to exclude them in combined policies of Life, Health, and Accident Insurance. We think this is unimportant. The health and accident portions of the combined policies are entirely separate contracts, *New York Life Insurance Company* v. *United States*, 12 Fed. (2d) 643. The health and accident premiums are separately shown therein. The specimen policy in evidence in this case shows that with the page covering casualty insurance removed it is a complete life insurance policy. When the insured desires health and accident insurance it is only necessary for the company to insert a page covering that class of insurance in its regular insurance policy form. Moreover, the disability insurance may be discontinued without affecting the life insurance and the reserves held on account of the health and accident insurance do not enter into the amount of the reserves held

by the company on account of life insurance covered by the policy, or the surrender, cash, or loan value shown therein. The two contracts are as separate and distinct as if written in separate policies. Plaintiff combines the two classes of insurance in one policy for the reason that it does not write disability insurance except when the applicant also purchases life insurance.

Plaintiff further contends that it is entitled to a deduction in respect of the health and accident reserves for the reason that they are technical insurance reserves. We think this contention cannot be sustained for the reasons above stated and for the further reason that we are here concerned with a life insurance company and the casualty reserves in question are not technical *life* insurance reserves. Their allowance would therefore result in a deduction to a life insurance company for casualty reserves which even a casualty company is not permitted to take for this class of insurance under the taxing provisions relating to such companies. The decisions of the United States Board of Tax Appeals in *The Equitable Life Assurance Society of the United States* v. *Commissioner of Internal Revenue*, 33 B. T. A. 708; *Monarch Life Insurance Company* v. *Commissioner*, 38 B. T. A. 716; *Pan-American Life Insurance Company* v. *Commissioner*, 38 B. T. A. 1430; and *Oregon Mutual Life Insurance Company* v. *Commissioner*, (memorandum opinion), docket nos. 85182 and 88299, do not appear to have given consideration and weight to this distinction. These decisions of the Board of Tax Appeals appear to rest upon the proposition that any reserve which is a technical insurance reserve is deductible by a life insurance company taxable under those provisions relating exclusively to such companies. The distinction between technical *life* insurance reserves and other technical insurance reserves, including liability or solvency reserves, has been observed in the leading cases, especially the more recent decisions upon the subject of technical insurance reserves, both in respect to the question of the net additions to reserve funds arising under the earlier revenue acts and to the deduction of 4 per centum of the mean of the reserve funds under the provisions relating entirely to life insurance companies in the Revenue

Act of 1921 and subsequent acts. A comparison of the decisions in *McCoach* v. *Insurance Company of North America*, 244 U. S. 585; *United States* v. *Boston Insurance Co.*, 269 U. S. 197; *New York Life Insurance Co.* v. *Edwards*, 271 U. S. 109, and other cases similar in character, with the decisions in *Helvering* v. *Inter-Mountain Life Insurance Co.*, *supra; Continental Assurance Co., Inc.* v. *United States*, *supra;* and *Helvering* v. *Illinois Life Insurance Co.*, *supra*, discloses an adherence to the principle that "reserve funds required by law" within the meaning of the taxing acts are those technical insurance reserves which are peculiar to the character of insurance companies claiming the deduction. In other words, a company which is taxable as a life insurance company may deduct only technical life insurance reserves which is the reserve attributable to and represents the value of the life insurance elements of the policy contracts.

Plaintiff also contends that inasmuch as interest is credited to the health and accident reserves here involved a proper consideration of its contractual obligations would require that such interest be exempted from taxation under the statute which lays a tax only upon investment income. This is a matter of policy which rests with Congress. It was evidently considered that the amount of casualty premiums which the company would probably never be called upon to pay under its health and accident insurance would sufficiently compensate for the taxation of any interest element in such reserves. Moreover, the interest element was involved in other reserves which have been denied as deductions to a life insurance company in certain of the cases hereinbefore cited. In addition, it should again be pointed out in this connection that this form of casualty insurance is taxable, if at all, under the provisions of the statute relating to insurance companies other than life or mutual. The basis upon which such insurance is taxable is quite different from that of life insurance companies and no deduction whatever is allowed on account of the mean of the reserve funds, but instead a deduction is allowed for claims accrued or losses incurred. In the classification of a company for the purpose of Federal taxation, advantages as well as disadvantages to the taxpayer may occur. By being classified as a life insur-

ance company plaintiff avoids the tax on premium income from its health and accident insurance for the reason that the provisions relating to a life insurance company do not lay a tax upon earned premiums nor upon gains or profits on the sale or other disposition of property. Neither does the statute, insofar as it relates to life insurance companies, permit deductions on account of that class of business. As was said by the court in *Shapleigh Hardware Co.* v. *United States*, 81 Fed. (2), 697, "The question is not whether this is a deduction which the taxpayer should, in fairness, be permitted to take, but whether it is a deduction which is clearly provided for in the Revenue Act." The presence of interest in a reserve does not, of itself, entitle the company to take the reserve as a deduction. The reserve disallowed by the court in *Helvering* v. *Illinois Life Insurance Co.*, *supra*, was created out of premiums and improved with part of the company's interest earnings.

We think the portion of the legislative history of the Revenue Bill of 1932 referred to by plaintiff in support of its arguments on the interest content of the health and accident reserves here in issue has no important bearing upon the question whether such reserves are deductible. The part relied upon only explains the reason due to the decline in interest rates for changing the deduction on account of the reserves required by law within the meaning of the taxing statutes from 4 to 3½ per centum.

Finally plaintiff contends on this issue that a deduction should be allowed on account of reserves for health and accident insurance because of the prior regulations and practice of the Treasury Department under which such reserve deductions have been allowed until recently, when the Treasury Department began to disallow deductions on account of reserves for "Disabled Lives." The past regulations and practice of the Treasury Department with reference to reserve deductions have not been entirely consistent. The regulations and practice in existence subsequent to January 1920 [15] and prior to Treasury Decision 4615, De-

[15] The date of the decision in *Maryland Casualty Co.* v. *United States*, 251 U. S. 342. See *Continental Assurance Co., Inc.* v. *United States*, 79 C. Cls. 756, 768. *Massachusetts Mutual Life Insurance Co.* v. *United States*, 74 C. Cls. 162, 166–171, 56 Fed. (2d) 897.

Opinion of the Court

cember 18, 1935 (33 T. D. 288), were not in harmony with the decisions of the Supreme Court hereinbefore cited. Although departmental regulations and practice will, in a proper case, be given great weight, they cannot abridge the law and they can only stand if they correctly interpret the statute. As was said by the court in *Koshland* v. *Helvering*, 298 U. S. 441, 445, "The question here, however, is not merely of our adopting the administrative construction but whether it should be adopted if in effect it converts an income tax into a capital levy." Similarly the question here is whether the past practice relied upon by plaintiff has permitted deductions to be taken by a life insurance company which are not allowable under the statute. Compare *M. E. Blatt Co.* v. *United States*, 305 U. S. 267. Inasmuch as deductions from gross income are matters of grace, only those items which clearly come within the class to which the particular statutory provision relates may be allowed. There is no room for implications or inferences, except as they are inevitable from the context. The rule that statutes levying taxes may not be extended by implication beyond the clear import of the language used nor their operations enlarged so as to embrace matters not specifically pointed out applies with equal or greater force to the determination and allowance of deductions. *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 87, 91, 93. Cf. *United States* v. *Pleasants*, 305 U. S. 357 (86 C. Cls. 679).

The present regulations as amended by T. D. 4615, *supra*, are not inconsistent with our conclusion that health and accident reserves are not deductible by a life insurance company. The regulations, as so amended, provide, in effect, that for the purpose of the deduction by a life insurance company the reserve contemplated does not include reserves not involving life contingencies.

We are of opinion that plaintiff is not entitled to recover and the petition must be dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

EASTERN OR EMIGRANT CHEROKEES AND WESTERN OR OLD SETTLER CHEROKEES v. THE UNITED STATES

[No. 42080. Decided April 3, 1939]

On the Proofs

Indian claims; perpetual outlet as fixed by treaties.—Where it is contended that the President of the United States, through his Secretary of War, in 1818 made a promise to the Cherokee Indians of a perpetual outlet west, as an inducement to them to move from the east to the west of the Mississippi River, it is held that although these promises had been held out to the Indians by the Secretary of War, nevertheless Congress did not grant an outlet in any treaty until 1828 and in this treaty the outlet is fixed as far as the sovereignty of the United States and their right of soil extend; and at that time the right of soil and sovereignty of the United States did not extend beyond the 100th degree of west longitude as fixed in the treaty with Spain in 1821.

Same; treaties.—Treaties entered into between nations are political and not judicial questions and courts can not declare a treaty fraudulent or noneffective.

Same.—The courts have to consider treaties as valid and binding.

Same; boundary of the United States.—At the time the patent in question was granted, the limit of the western boundary of the United States was fixed at 100 degrees of west longitude and the United States did not possess any sovereignty or right of soil west of that degree of longitude.

Same; outlet to west.—The outlet mentioned in the patent was that contained in the Indian Territory, and after the agreement of 1891, which was subsequently ratified in 1893, the Cherokee Indians conveyed for a valid and valuable consideration all their right, title, and interest to this outlet; therefore, from that date they have not possessed an outlet for which claim can be made against the United States.

Same; claim held invalid.—It is held that plaintiffs have no legal or equitable claim arising or growing out of any treaty or agreement or act of Congress which entitles them to compensation from the United States for which they have not been paid in full.

The Reporter's statement of the case:

Mr. Robert L. Owen for the plaintiff. *Messrs. Houston B. Teehee*, *Frank J. Boudinot*, *C. C. Calhoun*, *Ralph Hoyt Case*, and *Frank K. Nebeker* were on the briefs.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Harry W. Blair*, for the defendant. *Mr. George T. Stormont* was on the brief.

The court made special findings of fact as follows:

1. This suit is brought under a special jurisdictional act approved April 25, 1932 (47 Stat. 137), and is for compensation for the expropriation and use by the defendant of the "Outlet lands" west of the 100th meridian alleged to comprise 14,160,000 acres. The material part of the act reads as follows:

> That all claims against the United States of the Eastern or Emigrant Cherokees, and the Western Cherokee or Old Settler Indians, so-called, who are duly enrolled members of the Cherokee Tribe of Indians in Oklahoma, as classes, respectively, may be submitted to the Court of Claims, and jurisdiction is hereby conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims arising or growing out of any treaty or agreement between the United States and the Cherokee Indians, or arising or growing out of any Act of Congress in relation to Indian affairs, which the said Eastern or Emigrant and Western or Old Settler Cherokees may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States and paid in full: *Provided*, That said Eastern or Emigrant and Western or Old Settler Cherokee Indians may act together or as two bodies hereunder as they may be advised: *Provided further*, That the said Eastern or Emigrant and Western or Old Settler Cherokees may intervene in any suit or suits now pending in the Court of Claims under authority of the Act of Congress approved March 19, 1924 (43 Stat. L. 27, 28), in which the Cherokee Nation is party plaintiff and the United States party defendant.

2. The Eastern or Emigrant Cherokees are those Indians, or their successors, described in the Jurisdictional Act as recorded on the final rolls of the Cherokees of Oklahoma, described by the 9th Article of the Treaty of 1846. The Western or Old Settler Cherokees are those Indians described in the Jurisdictional Act and are those Cherokees or their successors, with whom the treaty of 1833, between the de-

fendant and the Cherokee Nation of Indians west of the Mississippi River, was made. They are identified in Article 4 of the treaty between the defendant and the whole Cherokee Nation of Indians of August 6, 1846. The plaintiffs, the Eastern or Emigrant Cherokees and the Western or Old Settler Cherokees together, are those Cherokees, or their successors, who were parties to the treaty of 1846 and who are in Article I referred to as the "whole Cherokee people"; they are the duly enrolled members of the Cherokee Tribe of Indians by blood in Oklahoma.

3. By a treaty between the defendant and the Cherokee Nation of Indians proclaimed December 26, 1817, and a treaty between the same parties, proclaimed March 10, 1819, the Cherokee ceded to the defendant approximately 4,500,000 acres of land owned by them east of the Mississippi River for and in consideration of a like number of acres west of the Mississippi River in what is now the State of Arkansas (40 C. Cls. 252). There is no mention in either of the treaties of 1817 or 1819 of any outlet west. The undertaking on the part of the defendant had no connection with or promise of an outlet. The Secretary of War, John C. Calhoun, in an interdepartmental letter to the Superintendent of Indian Affairs, dated May 8, 1818, stated the Cherokees were "anxious to have an outlet to the West to the game country, and it seems fair that the Osages, who hold the country west of their Settlement, and have been beaten in the contest, should either make a concession of such portion of their country as might give the outlet, or at least to grant them an undisturbed passage to and from their hunting grounds." He expressed to the Superintendent the desire of the President that some arrangement, consistent with justice be made favorable to the Cherokees and as an inducement to them and other Southern Indians to emigrate west of the Mississippi River. On the 29th of July 1818, the Secretary of War wrote the agent of the Cherokees East of the Mississippi River as follows:

> The President, in order to add as much as possible, to the permanent prosperity of the Cherokees on the Arkansaw, has given them an indefinite outlet to the west, which will continue their independence as long as practicable.

These letters were written between the treaties of 1817 and 1819, yet no mention of an outlet is made in the latter treaty.

4. On February 22, 1819, five days prior to the treaty with plaintiffs (February 27, 1819), a treaty was negotiated between the defendant and Spain by Article 3, which reads as follows:

> The boundary line between the two countries, west of the Mississippi, shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Nachitoches, or *Red River;* then following the course of the Rio Roxo westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red River, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January 1818. But, if the source of the Arkansas river shall be found to fall north or south of latitude 42, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea. * * *
>
> The two high contracting parties agree to cede and renounce all their rights, claims, and pretensions, to the territories described by the said line; that is to say: the United States hereby cede to his Catholic Majesty, and renounce forever, all their rights, claims, and pretensions, to the *territories lying west and south of the above-described line;* and, in like manner, his Catholic Majesty cedes to the said United States, all his rights, claims, and pretensions, to any territories east and north of the said line; and for himself, his heirs, and successors, renounces all claim to the said territories forever. [Italics ours.] (8 Stat. 252.)

This treaty was not ratified by the United States until February 19, 1821.

5. Subsequent to the treaty with Spain in 1819–1821 Mexican provinces federated and established their independence from Spain in October 1824, and created the

United Mexican States, succeeding Spain in sovereignty over all the lands west of the 100th degree west longitude. On January 12, 1828, a treaty between the United States and the United Mexican States was consummated whereby the West boundary line of the United States of America was fixed at the 100th degree west longitude. In the preamble to this treaty it is recited that the limits of the United States of America bordering the Territories of Mexico were fixed and designated in the treaty with Spain in 1819 and the object of the treaty was to confirm the validity of the limits as determined in the Spanish treaty and regard them as still of force and binding upon both the United States and the United Mexican States.

The first paragraph of the second article is as follows:

> The boundary line between the two countries, west of the Mississippi, shall begin on the gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river, to the 32d degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red river; then, following the course of the Rio Roxo westward, to the degree of longitude 100 west from London, and 23 from Washington; then, crossing the said Red river, and running thence by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South sea; the whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January 1818. But, if the source of the Arkansas river shall be found to fall north or south of latitude 42, then the line shall run from the said source due south or north, as the case may be, till it meets the said parellel of latitude 42; and thence, along the said parallel, to the South sea. All the islands in the Sabine, and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States; but the use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary on their respective banks, shall be common to the respective inhabitants of both nations.

6. The defendant and that portion of the Cherokee Nation west of the Mississippi River entered into a treaty dated

May 6, 1828, whereby the Western Cherokees exchanged the lands then occupied by them in what is now the State of Arkansas for other lands farther West, consisting of 7,000,000 acres, as a home; and in addition thereto an outlet west of the same "as far west as the sovereignty of the United States and their right of soil extend." There is in the preamble to this treaty a reference to the outlet in the following words:

> and resting also upon the pledges given them by the President of the United States, and the Secretary of War, of March 1818, and 8th October 1821, in regard to the outlet to the West, and as may be seen on referring to the records of the War Department * * *.

This is the first mention of an outlet west in any treaty between the plaintiffs and the defendant.

7. On the 14th of February 1833, an agreement was entered into between the Cherokees and the defendant fixing the boundaries of the seven million acres. In Article I there is also the following:

> In addition to the seven millions of acres of land, thus provided for, and bounded, the United States, further guarantee to the Cherokee nation a perpetual outlet west and a free and unmolested use of all the country lying west, of the western boundary of said seven millions of acres, *as far west as the sovereignty of the United States and their right of soil extend* * * *. [Italics ours.]

This treaty was proclaimed April 12, 1834.

8. The Cherokee Indians east of the Mississippi were not parties to the treaties of 1828 and 1833 at the time those treaties were entered into but subsequently became beneficiaries under these treaties by the treaty of August 6, 1846, between the whole Cherokee Nation of Indians and the defendant.

9. By the treaty of December 29, 1835, proclaimed May 23, 1836, the Cherokee Nation ceded to the defendant all lands east of the Mississippi in consideration of five millions of dollars and the defendant ceded to the Cherokee Nation 800,000 acres adjoining the western lands of the

Cherokees for $500,000. In this treaty there is a provision to

> guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

10. The Republic of Texas, having gained, in 1836, its independence from the United Mexican States, a treaty was entered into between the Republic of Texas and the defendant wherein it is recited that the treaty of limits of the 12th of January 1828, between the United Mexican States and the United States is binding upon the Republic of Texas and in order to prevent future disputes and collisions, a commission should be appointed to run the boundary between the two republics.

11. Beginning in 1838 the Eastern Cherokees were removed to the lands west of the Mississippi and placed on the lands ceded to the Cherokee Nation as above outlined.

12. On December 29, 1845, the Congress passed a joint Resolution admitting the State of Texas into the Union. (9 Stat. 108.)

13. By the treaty of 1846 it was provided in Article I thereof as follows:

> That the lands now occupied by the Cherokee nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of 1835, and in the third section of the act of Congress, approved May twenty-eighth, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, "to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided, always*, That such lands shall revert to the United States, if the Indians become extinct, or abandon the same." (9 Stat. 871.)

In this same treaty the fourth Article reads as follows:

> * * * The "Western Cherokees" or "Old Settlers," hereby release and quit claim to the United States all right, title, interest, or claim, they may have to a common property in the Cherokee lands east of the Mississippi River, and to exclusive ownership to the lands ceded to them by the treaty of 1833 west of the Mississippi, including the outlet west, consenting and agreeing that the said lands, together with the eight hundred thousand acres ceded to the Cherokees by the treaty of 1835, shall be and remain the common property of the whole Cherokee people, themselves included.

14. On the 31st of December 1838, a patent was duly issued and recorded in the General Land Office conveying to the Cherokee Nation certain tracts of land therein set forth containing in all 14,375,135 acres. The patent states in its preamble that the conveyance is made by the United States in consideration of the promises mentioned in the treaties of 1828, 1833, and 1835, "and whereas the United States have caused the said tract of seven millions of acres *together* with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows." There is inserted a description of the land conveyed which includes not only the seven million acres and the eight hundred thousand acres but lands which make up the fourteen million and odd acres. These additional acres were the lands contained in the outlet. The Western line was fixed at the "line dividing the territory of the United States from that of Mexico."

15. By an act of September 9, 1850, the United States proposed to the State of Texas that the north boundary between the United States and Texas be fixed

> at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the Gulf of Mexico. (9 Stat. 446.)

In this proposition is contained the relinquishment by Texas of all territory exterior to said boundaries and the establishment of the Territory of New Mexico.

On December 13, 1850, a proclamation by the President of the United States declared the acceptance by Texas of the above act and the fixing of the boundary of the State of Texas as defined therein.

16. A treaty was concluded between the Cherokee Nation of Indians and the defendant on July 19, 1866, which was accepted with amendments July 31, 1866, and proclaimed August 11, 1866. In this treaty the United States have the right to settle friendly Indians in any part of the Cherokee Country west of 96 degrees and

> Art. XVI * * * Said lands thus disposed of to be paid for to the Cherokee nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President.
>
> The Cherokee nation to retain the right of possession of and jurisdiction over all of said country west of 96° of longitude until thus sold and occupied, after which their jurisdiction and right of possession, to terminate forever as to each of said districts thus sold and occupied.
>
> ARTICLE XVII. The Cherokee nation hereby cedes, in trust to the United States, the tract of land in the State of Kansas which was sold to the Cherokees by the United States, under the provisions of the second article of the treaty of 1835; and also that strip of land ceded to the nation by the fourth article of said treaty which is included in the state of Kansas, and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said State. * * *

The tracts referred to include the 800,000 acre tract or Cherokee Neutral Land and a narrow strip of the Outlet lands being that portion of the Outlet in Kansas sometimes called the Cherokee Strip.

17. By section 14 of the act of Congress approved March 2, 1889, it is provided, among other things, as follows:

> SEC. 14. The President is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians and with all other

Reporter's Statement of the Case

> Indians owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and any and all agreements resulting from such negotiations shall be reported to the President and by him to Congress at its next session and to the council or councils of the nation or nations, tribe or tribes, agreeing to the same for ratification, and for this purpose the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, to be immediately available: * * *

Thereafter by an act of the Cherokee national council approved November 16, 1891, it is provided, among other things, as follows:

> That the principal chief is authorized, by and with the advice and consent of the senate, to appoint a commission of seven persons with authority to meet and enter into negotiations with the above-named commission, appointed by the President of the United States, for the cession of the lands of the Cherokee Nation west of the 96th degree of west longitude, and for the final adjustment of all questions of interest between the United States and the Cherokee Nation which are now unsettled; and it shall be the duty of said commission on the part of the Cherokee Nation to report their proceedings in full to the national council for their approval and ratification, and that of the Cherokee people, in such manner as the national council may decide to be necessary, before the same shall be obligatory and binding on the Cherokee Nation.

18. Pursuant to the authority conferred by the act of Congress and the authority conferred by the act of the Cherokee national council, as set forth in the finding next preceding, commissioners on behalf of the United States and commissioners on behalf of the Cherokee Nation were appointed. On December 19, 1891, the commissioners so appointed entered into an agreement, thereafter ratified by act of Congress of March 3, 1893 (27 Stat. 612, 640), which became known as the "Cherokee Outlet Agreement." In said agreement it was provided:

> ARTICLE I. The Cherokee Nation, by act duly passed, shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the

> Indian Territory bounded on the west by the one hundredth (100°) degree of west longitude; on the north by the State of Kansas; on the east by the ninety-sixth (96°) degree of west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation created or defined by Executive order dated August 10, 1869. The tract of land embraced within the above boundaries containing eight million one hundred and forty-four thousand six hundred and eighty-two and ninety-one one-hundredths (8,144,682.91) acres, more or less.

The Cherokees received as consideration for the relinquishment of claims to lands between the 96th and 100th degrees longitude $10,423,262.99, which included that portion of the Outlet conveyed to the Osages and the Kaws for which the Cherokees had received $2,000,000.

19. No title, right, or interest to or in any lands located between the 96th degree west longitude and the 100th degree west longitude was vested in the plaintiffs or the Cherokee Nation, or in any band or class of Cherokee Indians, subsequent to the ratification of the agreement known as the "Cherokee Outlet Agreement," and no treaty or agreement with the Cherokee Nation or any band or class of Cherokee Indians has granted an outlet west of the 100th degree west longitude.

The court decided that the plaintiffs were not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

This action is brought under the authority of a special Jurisdictional Act approved April 25, 1932, which confers upon this court jurisdiction to hear and determine "all legal and equitable claims arising or growing out of any treaty or agreement between the United States and the Cherokee Indians, or arising or growing out of any Act of Congress in relation to Indian affairs, which the said Eastern or Emigrant Cherokees or Western or Old Settler Cherokees may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States and paid in full" (47 Stat. 137).

Opinion of the Court

Plaintiffs seek to recover the value of lands lying in New Mexico, Texas, and the Indian Territory west of the 100th degree west longitude, claiming that this land was conveyed to the plaintiffs in what is known as the Cherokee "Perpetual Outlet West," and this ownership was created by treaties, agreements, or acts of Congress.

Prior to 1817 the United States were very anxious to have the Cherokee Indians, who resided east of the Mississippi River, move west of the Mississippi River, and in 1817 a treaty was entered into whereby lands west of the Mississippi River were exchanged for lands east of the Mississippi River. This treaty was not proclaimed until 1819 (7 Stat. 195). During 1818 the President of the United States and the Secretary of War expressed the desire to grant to these Indians an outlet west so as to provide additional hunting grounds. This was in the nature of an inducement to these Indians for their removal from the east to the west of the Mississippi River. However, in 1819, prior to the treaty with the Cherokee Indians, a treaty was negotiated between the United States and Spain in which the western boundary of the United States was fixed at the 100th degree west longitude and the United States ceded to Spain all its right, title, and interest to the territory lying west and south of that longitude. This treaty was ratified in February 1821 (8 Stat. 252).

The Mexican provinces federated and established their independence from Spain in 1824 and created the United Mexican States and became possessed of all the lands ceded to Spain by the United States under the treaty of 1821. In 1828 the United States and the United Mexican States entered into a treaty in which the western boundary line of the United States of America was fixed at the 100th degree of west longitude. In this treaty reference is made to the treaty with Spain in 1819–1821 and the limits so fixed in that treaty were confirmed and validated by this treaty (8 Stat. 372).

The Cherokee Indians west of the Mississippi River entered into a treaty with the United States in May 1828 whereby the lands occupied by them in the State of Arkansas were exchanged for 7,000,000 acres of land further west

and in addition, the United States granted an outlet west "as far west as the sovereignty of the United States and their right of soil extend" (7 Stat. 311). This is the first time in any treaty with the Cherokee Indians that mention is made of an outlet west and it is stated in the preamble that "this outlet is in conformity with the pledges given by the President of the United States and the Secretary of War in 1818." In 1833 the United States and the Cherokees entered into a treaty fixing the boundaries of the 7,000,000 acres and again it is stated that the United States guarantee to the Cherokee Nation a "perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend" (7 Stat. 414). At that time the United States did not have sovereignty or the right of soil beyond the 100th degree of longitude as fixed in the treaty with Spain and subsequently affirmed and restated in its treaty with the United Mexican States. Both of these treaties were made with the Western or Old Settler Cherokees but it will be seen, as we progress, that the Eastern or Emigrant Cherokees became parties to both the treaties of 1828 and 1833 by the treaty of 1846 (9 Stat. 871).

In 1835 a treaty was entered into between the Cherokee Indians and the United States whereby the latter ceded an additional tract of 800,000 acres to the Cherokees and agreed that a patent should issue for the said 800,000 acres and also for the 7,000,000 acres heretofore ceded as well as the outlet (7 Stat. 478).

The Republic of Texas declared and gained its independence from the United Mexican States in 1836 and a treaty was entered into between the United States and the Republic of Texas (8 Stat. 511) wherein it is recited that the limits of the two countries shall be that fixed in the treaty between the United Mexican States and the United States of America under the treaty of January 12, 1828 (8 Stat. 372). This was the treaty between the United States and the United Mexican States which fixed the limits of the boundary of the respective countries to that named in the treaty with Spain in 1821 (8 Stat. 252) and the boundaries in that treaty were fixed at the 100th degree of west longitude.

Opinion of the Court

A patent was issued and recorded in the General Land Office in December 1838 whereby the United States conveyed to the Cherokee Nation some 14,000,000 acres of land and it is recited in the preamble that the conveyance is made in consideration of the promises made in the treaties of 1828, 1833, and 1835. This patent covers not only the 7,000,000 acres and the 800,000 acres but also the outlet which is described by metes and bounds. It is stated in this patent that the western line is fixed at a "line dividing the territory of the United States from that of Mexico." (Sen. Ex. Doc. No. 124, 46th Cong., 2d Sess., Cong. Doc. Series 1885.)

The Republic of Texas was admitted into the Union as a State in 1845. (9 Stat. 108; 5 Stat. 797.)

Controversies having arisen between the Cherokees west of the Mississippi River, known as the Old Settlers, and those east of the Mississippi, known as the Emigrant Cherokees, with respect to the ownership of the various tracts of land and their interest therein, a treaty was entered into in 1846 whereby it was agreed that the lands occupied by the Cherokee Nation should be for the common use and benefit of the whole Cherokee people.

In 1850 the United States and the State of Texas fixed the northern and western boundary lines between the United States and Texas and in this agreement Texas relinquished all territory exterior to said boundaries and out of this was established the territory of New Mexico (9 Stat. 446).

By a treaty between the Cherokee Nation of Indians and the United States in 1866, the right to settle friendly Indians on a part of the Cherokee country west of the 96th degree of west longitude was given to the United States. There is also contained in this treaty the conveyance in trust to the United States of the tract of 800,000 acres known as the Cherokee Neutral Land and also the narrow strip, being that portion of the outlet lands in the State of Kansas, which is sometimes called the "Cherokee Strip" (14 Stat. 799).

Congress passed an act in 1889 providing for the creation of a Commission to negotiate with the Cherokee Indians and all other Indians owning or claiming lands west of the 96th degree of longitude in the Indian Territory for

the cession of their title, claim, and interest of every kind and character to the United States. Acting under this authority, negotiations were had with the Cherokee Nation, and in 1891 a final adjustment was agreed upon whereby the Cherokee Nation ceded all its lands west of the 96th degree west longitude (Sen. Ex. Doc. 56, 52nd Cong., 1st Sess., p. 28, Cong. Doc. Series 2900) and in 1893 Congress ratified the agreement whereby these lands were ceded to the United States. (29 Stat. 612, 640.) This agreement concerning the Cherokee outlet provided under Article I that the Cherokee Nation conveyed all its right, title, and interest of every kind and character to that part of the Indian Territory bounded on the west by the 100th degree west longitude and on the east by the 96th degree west longitude. It was stated in the agreement that some eight million and odd acres were contained therein. The United States paid for these lands some ten million dollars. The Cherokee Indians have not possessed any lands west of the 100th degree west longitude and the outlet, which was mentioned in the patent and described therein, was that outlet which is covered by the Cherokee Outlet agreement of 1893 and for which the Government paid an adequate consideration for its cession (25 Stat. 980, 1005).

The contention of the plaintiffs in this suit is that the President of the United States, through his Secretary of War, in 1818 made a promise to these Indians of a perpetual outlet west as an inducement to them to move from the east to the west of the Mississippi River. Although these promises had been held out to the Indians by the Secretary of War, nevertheless Congress did not grant an outlet in any treaty until 1828 and in this treaty the outlet is fixed as far as the sovereignty of the United States and their right of soil extend. At that time the right of soil and sovereignty of the United States did not extend beyond the 100th degree of west longitude as fixed in the treaty with Spain in 1821.

The plaintiffs contend that President Monroe, having in 1823 proclaimed the "Monroe Doctrine," whereby it was asserted that the North and South American continents were no longer open to colonization by a European power, the

treaty with Spain in 1821 was *nudum pactum* and Spain never entered into possession and took sovereignty and right of soil in the lands ceded by the United States. It has been so well established that treaties entered into between nations are political and not judicial questions and courts can not declare a treaty fraudulent or noneffective, that it is unnecessary to cite authorities. It is purely a matter for the political and not the judicial branch of the Government. The courts have to consider treaties as valid and binding. See *United States* v. *Old Settlers*, 148 U. S. 468. However, both in the treaty with the United Mexican States after they declared their independence from Spain and also in the treaty between the United States and the Republic of Texas, the treaty with Spain of 1821 was recognized by the United States.

A similar question arose in the case of the *United States* v. *Choctaw Nations*, 179 U. S. 494, 509, and the court stated:

> It is an important fact in this connection that prior to the treaty of 1830 the United States of America and the United Mexican States, by the treaty between them of January 12, 1828, recognized the boundaries of the respective countries to be as fixed by the treaty of 1819–1821 (8 Stat. 372, 374). And this position was maintained; for by a treaty concluded in 1838 between the United States and the Republic of Texas, the latter recognized as binding upon it the treaty made in 1828 with the United Mexican States. Treaties and Conventions (1776–1887), p. 1079. And in the settlement made in 1850 between the United States and the State of Texas the latter agreed that its boundary on the north should commence at the point at which *the meridian of* 100 *degrees west* from Greenwich is intersected by the parallel of 36°30′ north latitude, and run from that point west to the meridian 103 degrees west from Greenwich, then due south to the 32d degree of north latitude, thence on that parallel to the Rio Bravo del Norte, and thence with the channel of that river to the Gulf of Mexico (9 Stat. 446, c. 49; *United States* v. *Texas*, 162 U. S. 1, 39).

So it will be seen that, at the time the patent was granted, the limit of the western boundary of the United States was fixed at 100 degrees of west longitude and the United States did not possess any sovereignty or right of soil west of that

Syllabus

degree of longitude. The outlet mentioned in the patent was that contained in the Indian Territory, and after the agreement of 1891, which was subsequently ratified in 1893, the Cherokee Indians conveyed for a valid and valuable consideration all their right, title, and interest to this outlet. Therefore, from that date, they have not possessed an outlet for which claim can be made against the United States.

Plaintiffs have no legal or equitable claim arising or growing out of any treaty or agreement or act of Congress which entitles them to compensation from the United States for which they have not been paid in full.

Plaintiffs' petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

HARRY A. L. BARKER AND GARDNER L. BOOTHE, RECEIVERS FOR WARDMAN MORTGAGE & DISCOUNT CORPORATION, v. THE UNITED STATES

[No. 42424. Decided April 3, 1939]

On Demurrer

Income tax; illegal income.—Where a corporation loaned monies in the District of Columbia at the legal rate of interest and in addition to such interest charged the borrowers a so-called discount, it is held that such discount, even if illegal, is taxable income.

Same.—Usury laws are enacted for the benefit of the borrowers rather than the lenders.

Same.—That which is income within the meaning of the Sixteenth Amendment and the statutes enacted pursuant thereto is taxable notwithstanding it may have accrued or been received in connection with an illegal transaction.

Same, accrual method.—The taxability of income is not affected by the fact that the taxpayer employed the accrual method of accounting rather than the cash receipts and disbursements method; the taxation of income on the accrual basis is consistent with the provisions of the Sixteenth Amendment and is specifically recognized and provided for in the taxing statutes.

The Reporter's statement of the case:

Mr. Norman Fischer for the plaintiff. *Mr. Meredith M. Daubin* was on the brief.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff instituted this suit to recover an alleged overpayment of income tax with interest for 1926 and 1927 in the amounts of $14,405.49 and $14,497.78, respectively, totaling $28,903.27. The basis of the suit is that the Wardman Mortgage & Discount Corporation, hereinafter referred to as the "Corporation," charged its customers, and accrued upon its books and reported as gross income on the accrual basis for each of the years 1926 and 1927, certain amounts as discounts charged on loans made, which discounts, it is alleged, were in reality additional interest in excess of the legal rate of 6 per centum provided in the laws of the District of Columbia. It is, therefore, contended that such amounts did not constitute taxable income.

The defendant demurs to the petition on the ground that it fails to state a cause of action entitling the plaintiff to judgment against the United States.

The allegations of the petition show that the Discount Corporation consistently kept its books of account and made its Federal tax return on the accrual basis of accounting and that for the year 1926 it reported, on the accrual basis, a net income of $106,707.36 and a tax of $14,405.49 which was duly assessed and paid; that for 1927 it reported a net income on the accrual basis of $107,391 and a tax of $14,497.78 which was duly assessed and paid. Thereafter, in 1930, the corporation filed claims for refund which were considered and rejected by the Commissioner of Internal Revenue.

It appears that the Discount Corporation was engaged, among other things, in loaning money on mortgages and otherwise, and that, in making such loans, the corporation charged the borrower the legal rate of interest of 6 per

centum and an additional amount designated and accrued on the books as a "discount" in the nature of a commission for making the loan. The total of such discounts charged, accrued, and reported as income for 1926 was $67,659.44. The amount of interest at 6 per centum on the loans made by the corporation during 1926 and also reported as income was $45,994.61.

The total of the discounts charged by the corporation accrued on its books and reported as income for 1927 was $71,109.59. The interest at 6 per centum on the loans made during this year, which was also accrued and reported as income, was $49,293.30.

Plaintiffs contend that the net income of the corporation for the years involved should be adjusted by eliminating therefrom amounts of interest and discount reported as income which, they contend, were not income for the reasons (1) that the accrual basis of accounting employed by the taxpayer in keeping its books and making its returns did not clearly reflect its taxable income; (2) that the correct taxable income to the corporation is only that amount collected in cash during each year upon the interest legally due in that year; (3) that the interest, and discount which was in the nature of additional interest, should not be included in taxable income prior to actual collection thereof by reason of the peculiar circumstances of the debtor-creditor relationship and expectations of payments; and (4) that the legal rate of interest in the District of Columbia being 6 per centum and the attempted charge designated and treated as a discount during each taxable year being, in reality, usurious interest, the amount actually collected on account of such debt should, for tax purposes, be deemed to be and treated as a payment by the borrower on the principal of the loan.

We are of opinion that none of the contentions made can be sustained and that the petition does not state a cause of action entitling plaintiffs to recover any portion of the taxes paid for 1926 and 1927. The corporation loaned monies at the legal rate of interest but charged the borrowers, in addition to such legal interest, a so-called discount. It is the position of the receivers that the amount of such discount

Opinion of the Court

was in reality additional interest which, when added to the legal rate charged, exceeded, in the aggregate, the rates prescribed by Chapter 1 of Title 17 of the Code of Law of the District of Columbia. The usury laws of the District of Columbia were enacted for the benefit of the borrower rather than the lender, and neither the Discount Corporation nor the plaintiffs, as receivers, is entitled to invoke such laws in the circumstances obtaining here. The exact question here involved was presented to and decided by the United States Court of Appeals for the District of Columbia in connection with the tax liability of the corporation for 1928 and 1929 in the case of *Barker et al.* v. *Magruder*, 95 Fed. (2d) 122. With the opinion of the court in that case, we are in entire accord. In that case the collector filed a claim with the receivers for an unpaid assessment of taxes for 1928 and 1929. The case was referred to an auditor and upon his report the United States District Court for the District of Columbia directed that the claim be paid. The receivers prosecuted an appeal, and the judgment of the District Court was affirmed. The receivers advanced the same contentions in that case as are insisted upon here, and the Court of Appeals held that (p. 125) "The construction company—the borrower—is not pleading usury, and we think that the plea could not be made by the mortgage corporation—the lender—and cannot be made by its receivers. *Norton* v. *Commerce Trust Co., et al.*, 71 Fed. 2d 136."

To the same effect are *Johnston* v. *McLaughlin*, 55 Fed. (2d) 1068; *Marbelite Corporation of America* v. *Commissioner*, 30 B. T. A. 311, 314. See also *Terrell* v. *Commissioner*, 7 B. T. A. 773, and *Arthur R. Jones Syndicate* v. *Commissioner*, 23 Fed. (2d) 833.

On the decisions cited, we think it is clear that, independent of other considerations, plaintiffs are not entitled to recover. However, plaintiffs argue that because of the usury laws of the District of Columbia and the fact that the borrower might question the right of the corporation to charge the "discount," the accrual method of accounting employed by the corporation in keeping its books and making its returns would not clearly reflect its income and that the tax for the years involved should be computed upon the cash receipts

and disbursements basis and the amounts of discounts actually collected during each of the taxable years should be deemed to be a payment on the principal debt and be excluded from income.

That which is income within the meaning of the Sixteenth Amendment and the statutes enacted pursuant thereto is taxable notwithstanding it may have accrued or been received in connection with an illegal transaction. *United States* v. *Yuginovich*, 256 U. S. 450; *United States* v. *Stafoff*, 260 U. S. 477; *United States* v. *Sullivan*, 274 U. S. 259; *Steinberg* v. *United States*, 14 Fed. (2d) 564; *McKenna* v. *Commissioner*, 1 B. T. A. 326; *Green* v. *Commissioner*, 11 B. T. A. 185; *Terrell* v. *Commissioner*, *supra*.

The taxability of income is not affected by the fact that the corporation employed the accrual method of accounting rather than the cash receipts and disbursements method. The taxation of income on the accrual basis is consistent with the provisions of the Sixteenth Amendment to the Constitution and is specifically recognized and provided for in the taxing statutes (Sec. 1102 (a) of the Revenue Act of 1926, 44 Stat. 9). The amounts which plaintiffs here seek to have excluded from income for the taxable years in question were definitely charged as such discounts and accrued as income to the corporation in such years. That method of accounting, therefore, clearly reflects the corporation's income on the accrual basis. The taxing statutes require no more than that the method of accounting employed by taxpayer clearly reflects the income under that method. *Hegeman-Harris Co., Inc.* v. *United States*, 87 C. Cls. 296. See, also, *North American Oil Consolidated* v. *Burnet*, 286 U. S. 417, 424. In this case the court said: "If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent." What the court there said is true in a case where the taxpayer employs the accrual method of accounting. An amount which constitutes income under the Sixteenth Amendment and the taxing statutes is taxable in the year in which it accrues in the same way and to the same

extent as if it were actually received in cash. Its taxability is not affected because of its illegality. If in a subsequent year the amount becomes uncollectible or a loss is sustained in respect thereof, a deduction on account thereof is then allowable. *McDuffie, Trustee*, v. *United States*, 85 C. Cls. 212, 226, 227.

Upon the facts with reference to the transactions involved, which facts are as set forth in this opinion, we think it is clear that plaintiffs are not entitled to recover. The demurrer is therefore sustained and the petition is dismissed. It is so ordered.

Whaley, *Judge;* Littleton, *Judge;* Green, *Judge;* and Booth, *Chief Justice*, concur.

MACDONALD ENGINEERING COMPANY v. THE UNITED STATES

[No. 42612. Decided April 3, 1939]

On the Proofs

Government contract; delay in completion.—Where completion of work on remodeling Veterans' Hospital was delayed due to the failure of Government to vacate building and make it available, and where the delay resulted in extra costs due to the weather, it is held that contractor was not liable for liquidated damages and is entitled to recover for such extra costs.

Same.—Where a contractor's delay is caused by the other party to the contract, he cannot be held responsible for not completing the work within the specified time.

Same.—Where a contractor is prevented from executing his contract according to its terms, he is relieved from the obligation of the contract and from paying liquidated damages.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *King & King* were on the brief.

Mr. Edward A. Compton, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. J. H. Reedy* was on the brief.

The court made special findings of fact as follows:

1. Macdonald Engineering Company, plaintiff, organized under the laws of the State of Illinois, entered into a contract with the United States, through the Veterans' Administration, on March 19, 1932. The specifications under which the work was to be performed were attached to the contract and are hereby made a part of this finding by reference.

2. The contract was entered into after due advertisement for bids. For a consideration of $210,000 plaintiff agreed to furnish all labor and materials and perform all work required for the remodeling of Hospital Building No. 9 at the Veterans' Administration Hospital, Sheridan, Wyoming, for the construction of one addition to Hospital Building No. 9, with a connecting corridor, and for the construction of one Attendants' Quarters Building No. 64, including all walks, grading, plumbing, heating, electrical work and outside service connections, but not including electric elevator, in accordance with specifications, schedules, and drawings, which were all made a part of the contract.

3. The work was to be commenced within ten days after date of notice to proceed and was to be completed within 145 days after the date of such notice.

Plaintiff in submitting its bid planned to perform concurrently all the various building operations required for the three buildings and intended to utilize the full 145 days of contract time for the remodeling of old Building No. 9. It is disclosed by the record that the remodeling work on old Building No. 9 would have required 145 days of summertime weather to be performed in an orderly and workmanlike manner.

4. Plaintiff's authorized representative visited the site of the work on March 30, 1932, and requested the medical officer in charge of the hospital, who was the temporary representative of the contracting officer, to vacate old Building No. 9, informing him that to complete the work within the contract time operations would have to be concurrently performed and would have to start immediately upon receipt of notice to proceed. This officer stated that he could not vacate the building at that time and wrote the Veterans' Administration on that date that Building No. 9 housed

the acutely sick and post-operative cases; that there was no other available space at the hospital for housing the patients and facilities during the construction, and that old Building No. 9 should not be dismantled until new Building No. 9 was ready for occupancy.

5. The contracting officer on April 6, 1932, forwarded to plaintiff a letter instructing it to proceed with the work. Plaintiff, on April 9, 1932, acknowledged receipt of this notice. At the time the contracting officer ordered plaintiff to proceed, he knew that old Building No. 9 housed the acute and critical surgical cases, and that that building could not be made available to plaintiff for the purpose of remodeling it at the time plaintiff was required to begin work under the contract.

6. Plaintiff on April 12, 1932, addressed a letter to the defendant advising it that if the work was to be completed within the time specified it would be necessary that old Building No. 9 be vacated, otherwise, if the defendant desired to delay the construction of the work on that building it would have to grant plaintiff extra time and costs for this purpose. Plaintiff was thereupon requested by the defendant to submit a proposal for the remodeling of existing Building No. 9, after the additions thereto had been completed. Accordingly, plaintiff, on April 23, 1932, submitted its proposal for performing the work of remodeling old Building No. 9 after the completion of new Building No. 9, for an additional cost of $17,680 and 145 days' extension of time. This proposal was rejected by the defendant on June 20, 1932, by letter, which stated:

> With reference to your letter of April 23, 1932, relative to the remodeling of Building No. 9, under your contract at Sheridan, Wyo., which letter was addressed to the Superintendent of Construction and received here May 5, 1932, your attention is called to the following:
>
> Paragraph (b), General Method of Procedure, page (6–A) of the Specifications, provide that "All work shall be executed in such a manner as to interfere as little as possible with the normal functioning of the hospital and with work being done by others."
>
> The fourth sub-paragraph of paragraph (a), General Intention, page (6–A) of the Specifications, provides

that "Existing Hospital Building No. 9 will be vacated during remodeling, etc."

The above extracts from the Specifications provide that Building No. 9 will be turned over to you, not upon your demand, but when it will interfere as little as possible with the normal functioning of the hospital. It is possible that this might cause some delay in the progress of your work, for which a delay could be found in accordance with the provisions of Article 9 of the contract, but it will be necessary to present facts to show this conclusively. Your work should be planned to handle the remodeling of Building No. 9 so as to not interfere with the normal functioning of the hospital, and this should have been taken into account when estimating the time for completion in your proposal. * * *

Your assumption that both of these operations could proceed concurrently was unwarranted in view of the provisions quoted above. * * *

For the above reasons your request for an additional $17,680.00 and 145 days additional time must be denied.

7. Plaintiff proceeded with the work required of it under the contract, other than that of remodeling old Building No. 9.

As soon as plaintiff began work on New No. 9, it developed that the subsoil was not sufficient to bear the load of the footings. On May 19, 1932, the Assistant Superintendent of Construction issued a stop order, to remain effective until the receipt of further instructions. On June 7, 1932, plaintiff was instructed to proceed with the additional work. Because of the stop order, defendant extended the plaintiff's contract time 20 days; and for additional work required by the lowering of the footings, defendant extended the contract time another 20 days. The total increased time allowed in this connection was 40 days.

On August 15, 1932, the elevators to be installed in new Building No. 9, by the Montgomery Elevator Company, under a separate contract with defendant, were not available. This prevented the plaintiff from proceeding with construction of partitions, plastering, and painting until October 12, 1932, at which date the elevator doors were installed. For this delay, the Veterans' Administration, on

March 24, 1933, granted an extension of plaintiff's contract time for a period of 59 days.

8. On August 23, 1932, the defendant turned over to plaintiff Old Building No. 9 for the purpose of remodeling. When plaintiff's representative questioned plaintiff's right to proceed with the remodeling of Old Building No. 9 until the issuance of a notice to proceed, the Veterans' Administration advised plaintiff, by letter of August 18, 1932, that the original notice to proceed had not been modified, and that it would not be necessary to issue a special notice to proceed on Old Building No. 9.

Plaintiff prosecuted the work of remodeling old Building No. 9 with diligence from the time the building was made available on August 23, 1932 until February 13, 1933, upon which date the work was completed. This date also marked the completion of all the work under the contract and the buildings were accepted by the defendant on that date. The plaintiff in remodeling old Building No. 9 consumed a period of 175 days, not including Sundays. Because of adverse weather conditions, hereinafter described, 175 days constituted reasonable performance.

9. On February 13, 1933, plaintiff made a written request for an extension of 133 days, representing the delay encountered in obtaining access to old Building No. 9. On March 22, 1933, this request was rejected. The authorized representative of the Director of Construction, who was also the contracting officer, directed a letter to plaintiff rejecting its request for 133 days' extension of time, and assigned the following reasons therefor:

> With reference to your claim of February 13, 1933, for 133 days' delay because you were prevented from proceeding with the Remodeling of Building No. 9, this part of the work represented about 5 percent of the whole contract. Therefore this delay did not interfere with the major portion of the contract, and the Remodeling of Building No. 9 could have been completed prior to or not later than the completion of the remainder of the work, which would not have delayed the completion of the contract as a whole. Adding to the 145 days original contract time the delay of 20 days found by letter of January 11, 1933, plus the 20 days extension allowed by Change Order "E," plus the 59

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days delay claimed because of delay in installing the electric elevator in the Addition to Building No. 9, makes a total of 244 days that might have been required for completing the Addition to Building No. 9. Subtracting the 133 days delay claimed in the Remodeling of Building No. 9 leaves 111 days, which should be sufficient for the Remodeling of Building No. 9. Therefore this claim must be rejected.

Plaintiff, on April 19, 1933, prosecuted an appeal from the decision of the contracting officer to the Director of the Veterans' Administration, which official confirmed the decision of the contracting officer denying the request for 133 days' extension of time.

The original contract date for completion was September 1, 1932. Prior to the completion of the work on February 13, 1933, plaintiff had been granted extensions of time for a total period of 99 days for reasons other than failure of the defendant to make available old Building No. 9 at the time the work was commenced. This brought the completion date of the contract up to and including December 9, 1932. Upon settlement with plaintiff the defendant deducted and retained, as liquidated damages, $100 a day for the 67 days intervening between the completion date as extended, December 9, 1932, and the date of the actual completion of the work on February 13, 1933. Plaintiff accepted final payment, reserving its rights of protest, appeal, and suit for any balance due.

10. Sheridan, Wyoming, has an elevation of 3,790 feet above sea level. The site of the work was 4 miles from the town of Sheridan and 3 miles off the regular highway.

From April, through September 1932, the months within which plaintiff had calculated the remodeling work would be done, normally good weather prevailed for construction purposes.

During October 1932 the temperature was below normal for Wyoming. At Sheridan there were 23.3 inches of unmelted snow, and 3.27 inches of precipitation, with either rain or snow on 14 days of the month. The highest temperature was 79 degrees, the lowest 4 degrees, and on 22 days the temperature dropped below the freezing point.

In the month of November there were 5.0 inches of unmelted snow, and 0.61 inch of precipitation, with either rain or snow on 14 days during the month. The highest temperature was 66 degrees, the lowest 8 degrees, and temperature below freezing on 28 days.

December 1932 opened abnormally mild and dry, but a change to severe weather, accompanied by snow occurred on the 5th. For the week ending December 14 the daily temperature averaged more than 30 degrees below normal throughout Wyoming. At Sheridan there were 8.0 inches of unmelted snow and 0.42 inch of precipitation, with either rain or snow on 12 days. The highest temperature was 58 degrees, the lowest 26 degrees below zero, and the temperature below freezing for some part of every day in the month.

In the month of January 1933 there were 8.6 inches of unmelted snow and 0.67 inch of precipitation, with either rain or snow on 15 days. The highest temperature was 62 degrees, the lowest 18 degrees below zero, and temperature below freezing for some part of each day of the month.

The month of February 1933 was the fifth coldest February since the Wyoming State-wide records began in 1892. Abnormally low temperatures occurred during the second week. At Sheridan there were 7.9 inches of snow, and 0.64 inch of precipitation, with either rain or snow on every one of the first 13 days. During the same period the highest temperature was 47 degrees, the lowest 33 degrees below zero, and temperature below the freezing point on each of these 13 days.

Because of the low temperatures encountered the Superintendent of Construction directed plaintiff to install temporary closures and temporary heat so the plaster would not freeze and interior painting could progress. The installation of temporary heat with the windows closed produced excess humidity which retarded the drying of the plaster. The delayed drying of the plaster in turn held up the installation of mill work, trim, floors, hardware, plumbing, heating, electrical fixtures, and painting. Because of low temperatures the Government inspector on several occasions ordered the work stopped. At times it was impossible for the workmen to come out to the site of the work through the heavy snow

drifts on the roads. There were occasions when, after arriving at the site, it was too cold for the men to do any work.

11. Because of the prolongation of the work, and its performance during the severe weather conditions shown in the preceding Finding, plaintiff incurred increased costs in the performance of the work, over what it would otherwise have had, as follows:

1. Plumbing and heating, including supervision	$9, 617. 41
2. Lathing and plastering, including supervision	5, 446. 91
3. Supervision for brick work subcontractor	980. 00
4. Supervision for concrete subcontractor	836. 00
5. Supervision for painting subcontractor	800. 88
6. Supervision for marble and tile subcontractor	748. 00
7. Workmen's Compensation and Public Liability Insurance	768. 90
8. Plaintiff's supervision	4, 118. 00
Total	23, 316. 10

The court decided that the plaintiff was entitled to recover.

Williams, *Judge*, delivered the opinion of the court:

On March 19, 1932, plaintiff entered into a contract with the defendant, through the Veterans' Administration, under which plaintiff agreed to furnish all labor and materials, and perform all work required for the completion, at Veterans' Administration Hospital, Sheridan, Wyoming, of an addition to Hospital Building No. 9, with connecting corridor, remodeling of Hospital Building No. 9, and a new Attendants' Quarters Building No. 64, with walks and grading in connection with these buildings; including plumbing, heating, electrical work and outside service connections, for the consideration of $210,000, in accordance with the plans and specifications, all of which were made a part of the contract.

The contract provided that work should be commenced within 10 calendar days after receipt of notice to proceed, and should be completed within 145 calendar days after receipt of notice to proceed. The contract further provided for the payment to the Government as liquidated damages $100 for each calendar day beyond the date stated in the contract which the contractor might require to complete the

work, as compensation to the Government for its delayed possession.

In submitting its bid plaintiff planned to perform concurrently all the various building operations required for the three buildings and when awarded the contract intended to utilize the full 145 days of the contract time for remodeling old building No. 9. The work in remodeling this building is shown by the record to have been of such nature as to require 145 days of normal summer weather for completion.

Plaintiff visited the site of the work on March 30, 1932, and requested the medical officer in charge of the hospital, who was at that time the temporary representative of the contracting officer, to vacate old Building No. 9 and informed him that to complete the work within the contract time operations would have to be concurrently performed and would have to be started immediately upon the notice to proceed. The medical officer informed plaintiff he could not vacate the building at that time, as it housed acutely sick and post-operative cases and included the surgery, dental clinic, eye, ear, nose and throat clinic, laboratory, and pharmacy; that there was no other available station for housing the patients and facilities during construction, and that old Building No. 9 could not be dismantled until new Building No. 9 was ready for occupancy.

On April 6, 1932, the contracting officer instructed plaintiff, by letter, to proceed with "additions to Building No. 9 and new Attendants' Quarters at Veterans' Administration Hospital, Sheridan, Wyoming." On April 9, 1932, plaintiff acknowledged receipt of this notice, and on April 12, 1932, wrote the defendant that if the work was to be completed within the specified time it would be necessary to vacate Building No. 9 immediately, and that if defendant desired to delay the starting of the work on that building it would have to grant the plaintiff extra time and costs on this account. Defendant thereupon requested plaintiff to submit a proposal for performing the work on Building No. 9 after new Buildings Nos. 9 and 64 had been completed. On April 23, 1932, plaintiff submitted a proposal of this kind, which was rejected by defendant on June 20, 1932.

Plaintiff proceeded with the work other than that of remodeling Building No. 9 and prosecuted the work diligently

until August 23, 1932, on which date the work on new Building No. 9 and Building 64 was practically completed. On that date the defendant vacated old Building No. 9 and made it available to plaintiff for remodeling. At that time 136 of the 145 days of contract time had expired and it was manifestly impossible for plaintiff to complete the work within the 145 days specified.

Plaintiff proceeded with the work of remodeling old Building No. 9 with reasonable diligence until February 13, 1933, when all work under the contract was completed and accepted by the defendant. The completion date of the work was the 311th day of the contract time. Of the time thus used 145 days represented the original contract time, 99 days represented delays encountered in the foundations and in the installation of elevators for new Building No. 9, for which plaintiff was granted extensions of time, and 67 days for which no extension of time was granted.

Upon settlement with the plaintiff for the work defendant deducted and withheld as liquidated damages, from moneys otherwise due the plaintiff, $6,700, or $100 a day for each of the 67 days' delay in completing the contract beyond the contract time as extended. Plaintiff accepted the final payment, under protest, reserving its right to bring suit for any balance due.

In this suit plaintiff seeks to recover $32,784.93, representing losses alleged to have been sustained in the execution of the contract, arising from the defendant's failure to turn over to plaintiff one of three sites on which work was to be performed at the time notice to proceed was issued, which resulted in protracting the period of performance and increasing the cost of the work. In addition plaintiff seeks recovery of the $6,700 liquidated damages withheld by defendant at the time of settlement.

Undoubtedly plaintiff had the right to perform concurrently all the various building operations required for the three buildings covered in the contract. Compensation for the work involved was fixed in the contract at a lump sum and the time restriction of 145 days for the completion of the work had application to each of the three buildings. The whole job was to have been completed within 145 days,

beginning 10 days after the receipt of notice to proceed with the work. Plaintiff, therefore, was clearly entitled to have old Building No. 9 turned over to it and made available for the work of remodeling at the time the work started, and the failure and refusal of the defendant to make the building available to plaintiff at that time was a clear breach of the contract. The record warrants the conclusion that had old Building No. 9 been made available to plaintiff at the time plaintiff was notified to proceed with the work the entire contract would have been completed within the limited time for performance as such time was extended by the defendant for causes other than its failure to turn old Building No. 9 over to plaintiff until August 23, 1932.

Defendant by its action delayed the plaintiff in the work of remodeling Building No. 9 from the date of the commencement of the work in April 1932 until the building was vacated and turned over to plaintiff on August 23, 1932. The defendant's failure to make available old Building No. 9 with the issue of notice to proceed was alone responsible for the delayed completion of the contract. Plaintiff was clearly entitled to an extension of the contract time for the period of this delay, and the decision of the contracting officer rejecting plaintiff's application for such extension of time was arbitrary and capricious and without binding effect on plaintiff.

The law is well established that where a contractor's delay is caused by the other party to the contract, he cannot be held responsible for not completing the work within the specified time, *Levering & Garrigues Co.* v. *United States*, 73 C. Cls. 566, and that where a contractor is prevented from executing his contract according to its terms, he is relieved from the obligation of the contract and from paying liquidated damages, *Ittner* v. *United States*, 43, C. Cls. 336. The rule is well stated in *Moore, Receiver*, v. *United States*, 46 C. Cls. 139, 181, where the court said:

> The law is well settled that when a contractor is delayed by the owner in the prosecution of his work he is relieved from the time limit in the contract; or, as it is sometimes expressed, the owner is thereby deemed to have waived it. This rule is so clearly reasonable as to hardly need citation of authority (*Dannat* v. *Fuller*, 120

N. Y. 554; *Texas & St. L. Ry. Co.* v. *Bust*, 19 Fed. Rep. 239; *Manufacturing Co.* v. *United States*, 17 Wall. 592; *Ittner* v. *United States*, 43 C. Cls. 336). It follows as a corollary of this rule that in case of such delay the contractor is entitled to a reasonable extension of the time limit named in the contract for performance.
* * * It follows from this that the claimant is not chargeable with anything on account of delay, as provided for in the contract, but is entitled to recover such damages as were sustained by reason of such delay on the part of the Government.

The rule announced in the foregoing decisions has uniformly been followed by this court in cases too numerous for citation here and its correctness is not now questioned.

Plaintiff was relieved from its contract obligations to pay liquidated damages because of the delay of the defendant in making available old Building No. 9 until it had become impossible for plaintiff to complete the work within the time limit of the contract. Thereupon plaintiff became charged with the obligation of completing the work within a reasonable time. The work of remodeling old Building No. 9 was completed within a period of 175 days from the date it was made available to plaintiff. It is shown that the work was performed within a reasonable time in view of the conditions encountered. Liquidated damages in the amount of $6,700 were therefore wrongfully assessed against plaintiff and retained by the defendant from moneys otherwise due plaintiff. Plaintiff is entitled to recover this amount.

The delay of plaintiff in getting possession of old Building No. 9 necessarily carried the work on that building over into the winter months of 1932 and 1933. The records show that beginning early in October 1932 and extending through until the completion of the work on February 13, 1933, most unusual and severe weather conditions prevailed. Most of the time during this entire period the temperature was below the freezing point and during much of the time subzero weather prevailed. The work was greatly impeded by the unfavorable weather and on several occasions the Government inspector ordered the work stopped. At times it was impossible for the workmen to come out to the site of the work due to heavy snow drifts on the roads, and there were occasions when after arriving at the site it was too

cold for them to do any work. Because of the low temperature encountered the superintendent of construction directed plaintiff to install temporary closures and temporary heat so the plaster would not freeze and the interior painting could proceed. These conditions not only impeded the progress of the work and resulted in its prolongation but greatly increased its cost to plaintiff. The findings disclose that as a direct result of the prolongation of the work and the necessity of performing it under severe weather conditions plaintiff sustained losses and damages aggregating $23,316.10. These losses are set out in detail in Finding No. 11 and need not be restated here. These losses would not have been sustained by plaintiff except for the defendant's delay and failure to observe its obligation under the contract to make available to plaintiff old Building No. 9 at the time notice was issued to start work on the contract.

The rule is firmly established that where the contractor is delayed in the performance of his contract, as plaintiff was in this case, and suffers losses that would not have been sustained except for the Government's delay and failure to observe its obligations under the contract, the contractor is entitled to recover therefor. *McCloskey* v. *United States*, 66 C. Cls. 105; *Carroll* v. *United States*, 76 C. Cls. 103; *Snare & Triest* v. *United States*, 43 C. Cls. 364; *Worthington Pump & Machinery Corp.* v. *United States*, 66 C. Cls. 230. In *Phoenix Bridge Co.* v. *United States*, 85 C. Cls. 603, 628, the court said:

> It is well settled that where a contractor is delayed by the Government in the prosecution of work under a contract he is entitled to recover as damages the expenses incurred by reason of such delays which would not otherwise have been necessarily incurred.

Plaintiff under the authorities cited is entitled to recover the losses sustained by it by reason of the delayed completion of the work under the contract amounting to $23,316.10.

Plaintiff upon the whole case is entitled to recover $30,-016.10 and judgment in that amount is hereby awarded.

Whaley, *Judge;* Littleton, *Judge;* Green, *Judge;* and Booth, *Chief Justice*, concur.

Syllabus

GUSTAVUS G. BENFIELD, SIDNEY R. SMALL, AND F. CALDWELL WALKER, IN THEIR CAPACITY AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MARGARET T. WALKER, DECEASED, v. THE UNITED STATES

[No. 42879. Decided April 3, 1939]

On the Proofs

Income tax; legatee under will and agreement.—Where under the executed will of her deceased husband, the widow was to receive annually during her life a stated amount, for which purpose the executors were directed to set apart assets of the estate sufficient to pay said amount from the income thereof, and where, after the death of testator, his heirs entered into and executed an agreement that the provisions of a later, unexecuted will should be carried out after the executed will had been probated, and by this agreement a larger amount was paid to the widow annually, partly from the income from the assets set aside as a trust fund for that purpose, and partly from the corpus of the fund, it is held that the widow was not a mere beneficiary of a trust created for her benefit but was, under the requirement of the will that a certain sum be paid to her annually as an annuity, a legatee and that the exemption of her annuity from taxation was not altered by the agreement executed by the heirs.

Same.—Where annual payments are made by the fiduciary of a trust under a will and such payments do not depend upon income from the trust estate but are payable without regard to the income received by the fiduciary, they are made in discharge of a gift or legacy and are not taxable.

Same; statutory exemptions.—Under the decision in *Lyeth* v. *Hoey*, 305 U. S. 188, a settlement of an estate which provides for the probating of a will does not do away with statutory exemptions; what the plaintiff in that case received by virtue of the agreement over and above what he would have got under the will, he received because of his standing as an heir and his claim in that capacity.

Same.—In the instant case, under the rules laid down in the *Lyeth case, supra*, the fact that the annual payments made to the wife of the testator under the agreement were more than she would have received under the executed will would not prevent the payments made from being exempt if she was an heir, as in fact she was; whatever additional amount she received under the agreement was merely a gift and consequently not taxable.

Same; equitable estoppel.—In the instant case, there being no obligation on the part of the widow to pay the tax, her recovery would inure to her benefit alone without affecting the interests of the other heirs of her husband. *Stone* v. *White*, 301 U. S. 532, distinguished.

The Reporter's statement of the case:

Mr. Arthur L. Evely for the plaintiffs. *Messrs. Raymond H. Berry* and *Ralph W. Barbier* were on the briefs.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Sidney R. Small and F. Caldwell Walker, two of the above-named plaintiffs, are resident citizens of the United States, the former being a resident of Detroit, Michigan, and the latter of Santa Barbara, California.

Gustavus G. Benfield, the other plaintiff, is a resident citizen of the Dominion of Canada, residing in the Town of Walkerville, Province of Ontario. The Government of the Dominion of Canada accords to citizens of the United States the right to prosecute claims against the Government of Canada in its courts.

2. Margaret T. Walker, a resident of Detroit, Michigan, died July 18, 1933, leaving a last will and testament which was duly admitted to probate by the Probate Court of Wayne County, Michigan, September 20, 1933. On the same day letters testamentary were issued by that court appointing plaintiffs in this proceeding as executors of her last will and testament. Plaintiffs acted as executors continuously from the date of their appointment to May 3, 1935, on which date F. Caldwell Walker submitted his resignation, which was accepted by the Probate Court. The remaining executors are now, and have been continuously since the date of their appointment, acting as executors of the last will and testament of Margaret T. Walker.

3. The husband of Margaret T. Walker was James Harrington Walker, who died December 16, 1919, leaving a last will and testament which was duly admitted to pro-

bate by the Probate Court of Wayne County, Michigan, February 25, 1920. Letters testamentary were issued by that court appointing Hiram H. Walker, F. Caldwell Walker, and Harrington E. Walker as executors of that will. These executors duly qualified and acted as such until their discharge on March 25, 1930. On June 2, 1922, these individuals were duly appointed trustees under that will, and letters of trusteeship were issued by the court on that day. June 17, 1921, the same will was duly proved and registered in the surrogate court of the County of York, Province of Ontario, Dominion of Canada, and ancillary administration of the estate was granted by that court to Harrington E. Walker, Hiram H. Walker, F. Caldwell Walker, and National Trust Company, Ltd., a Canadian corporation.

4. The beneficiaries of the estate of Margaret T. Walker are her three children, Mary Margaret Walker Small, Elizabeth Walker Patterson, and F. Caldwell Walker. The beneficiaries of the estate of James Harrington Walker are Harrington Walker, Hiram H. Walker, F. Caldwell Walker, Mary Margaret Walker Small, Elizabeth Walker Patterson, and the children of Mary Margaret Walker Small and Elizabeth Walker Patterson.

5. The last will and testament of James Harrington Walker contains the following provisions relating to certain payments to be made to Margaret T. Walker:

> SECOND: I hereby direct my trustees to set apart out of the assets of my estate and to hold separately sufficient thereof amply to provide the necessary funds and income to carry out the provisions of this second subdivision of my Will. I hereby give and bequeath to my wife, Margaret Talman Walker, and I hereby instruct my trustees to pay to her out of the income of said funds above provided to be set apart the sum of fifty thousand dollars per annum during her natural life, such payments to be made to her at such convenient times and in such amounts monthly or quarterly as she may from time to time desire.
>
> My trustees shall also, out of my estate, pay over to or for my said wife during her life the rent of the apartments in Garden Court in Detroit, where we now reside, or of such other suitable apartments of a similar character, in lieu thereof, as she may desire. They shall also allow her the use of the garage and property

located on the south side of Woodbridge Street, No. 666, west of Joseph Campau Avenue, Detroit, and shall also pay the taxes on said garage and keep the same in repair. My trustees shall also allow my wife, during her life, the use of the furniture and effects in the said apartments where we now reside, and the use of the furnishings and contents of the said garage, including automobiles, furniture, and equipment. Should my wife prefer to reside in a private dwelling house instead of an apartment, my trustees are hereby authorized and instructed to expend an amount not exceeding fifty thousand ($50,000.00) dollars for the purpose of either buying a house already built or buying a lot and erecting a house thereon under her direction, and in either case my trustees shall provide for her the use of such house during her life free of taxes and cost of repairs, in the same manner as if she had continued to live in an apartment. My trustees shall also provide for her free of taxes and cost of repairs, during her natural life, our summer home at Magnolia, Massachusetts, and the furniture and effects thereof including the garage and its furnishings and contents including automobiles, furniture and equipment. If desired by my said wife, said summer home may be sold by my trustees for what may be in their judgment a reasonable price, and the proceeds thereof may be used to purchase another, including garage, or to pay the rent of another summer home and garage for my said wife's use as she may elect, or in lieu thereof she may have the income arising from the sale of said summer home during her natural life. When selling this summer home my trustees shall have full discretion as to the terms and manner of sale, and as to credit and security, and may accept other property in exchange in whole or in part. Should another summer home be procured for my wife my trustees shall allow her the use thereof free of taxes and repair charges.

The provisions made in this my Will for my said wife shall be in lieu of all dower and other rights given her by law in my estate.

Upon the decease of my said wife, the principal of the above provided funds for my wife, including the principal arising from a sale of said summer home (if it shall have been sold) shall fall into and become part of the residue of my estate hereinafter referred to in subdivision seven of this Will, together with all income from the above mentioned funds which are not required to meet the charges imposed in favor of my wife by this subdivision.

Reporter's Statement of the Case

THIRD: The bequests given by this third subdivision are to be paid or delivered at such times and in such amounts from time to time as my trustees may deem expedient, and no legatee shall have the right to call for payment or delivery until my trustees so deem expedient, and I expressly declare that the bequests in this clause are subject to the setting apart of the portion of my estate pursuant to the second subdivision hereof, and should my trustees deem it expedient to delay the payment or delivery in whole or in part of any bequest in this clause because of such setting apart, I give them uncontrolled discretion as to which bequests are to be delayed and how much thereof from time to time and as to which and how much are to be paid or delivered. Pending payment or delivery of any bequest I authorize my trustees to pay out of the income of my estate to those entitled such interest or income upon the bequests as my trustees may from time to time decide from such dates after my death as they think proper.

6. December 28, 1919, a written agreement was entered into by and between Margaret T. Walker, widow of James Harrington Walker, and Harrington E. Walker, Hiram H. Walker, and F. Caldwell Walker, the three sons of James Harrington Walker, and Mary Margaret Walker Small and Elizabeth T. Walker, the two daughters of James Harrington Walker. The agreement provided as follows:

AGREEMENT made the 28th day of December A. D. 1919, between the undersigned who are the widow and three sons and two daughters of James Harrington Walker of Detroit, Mich., who died in New York on the 16th of December 1919.

Mr. Z. A. Lash having under the said J. Harrington Walker's directions given in New York on the 11th and 12th of December prepared for him a new Will which Mr. Lash would have sent him for completion and signature on the very day of his death, and which would have been signed had he not died suddenly. We, his family, have agreed, and do hereby agree, the one with the others and with each other, to do everything which may be necessary in order that the wishes of the said J. Harrington Walker as contained in the said Will prepared by Mr. Lash may, so far as we are or any of us is concerned or affected, be carried out, and all consents and documents required for that purpose and all instructions to the executors and trustees of the existing executed Will which may be required will be signed

and given by us, and we request Mr. Lash to see to the carrying out of this agreement. We have not seen the Will prepared by Mr. Lash, nor the existing Will, and we requested Mr. Lash not to disclose to us their contents or the differences between the existing Will and that prepared by him, as we wish to sign this agreement before we know the contents of these papers for we regard as sacred his last wishes and directions. Whatever application to any Court may be necessary on behalf of Elizabeth (who is a minor) to make this agreement and the carrying out thereof effective will be made. Probate of the existing Will shall be applied for in order that this agreement may be properly and effectively carried out.

7. The unexecuted will of James Harrington Walker, which had been prepared shortly prior to his death and which is referred to in finding 6, contains the following provisions relating to certain payments to be made to Margaret T. Walker:

SECOND: I direct my trustees to set apart out of the assets of my estate and to hold separately such parts thereof as in their judgment will provide amply for the annuity hereby given to my wife Margaret Talman Walker, and I hereby instruct my trustees to pay to her out of the income of said assets so set apart the annuity of seventy-five thousand dollars per year during her life, such annuity to be paid to her at such convenient times and in such amounts monthly, quarterly, or otherwise, as she may from time to time desire.

In setting apart such assets the trustees may exercise their discretion from time to time, and may add to or take from or change those first set apart, and may deal with and distribute the remaining assets in accordance with the provisions of my will, and no error of judgment with reference to the value or sufficiency of the assets set apart or the income thereof for the purposes of said annuity shall render the trustees liable or accountable to any person, or shall prejudice any dealing with or distribution of remaining assets. If for any reason the income of the assets set apart shall fail to yield a sum sufficient to provide for said annuity in any year or years, the deficiency may be made up out of the principal or corpus of the assets set apart.

I give to my said wife the furniture, furnishings, and other household effects in or used in or for the apartments in Garden Court, Detroit, where we now reside; also my automobiles and garage furnishings, effects,

and equipment used or intended for use in connection with such automobiles.

I direct my trustees to allow my said wife to live in and use during her life or so long as she may desire free of rent or charge to her my summer home at Magnolia, Massachusetts, and in connection therewith the furniture, furnishings, and effects thereof and therein, or intended for use therein, including the garage and its furnishings and effects, including automobiles and garage equipment, and I give my said wife the right to select and retain as her own property such things from said furniture, furnishings, and effects of said summer home as she may wish to keep as her own.

My trustees shall decide any questions which may arise as to what is or is not included in the furniture, furnishings, and other effects of the said apartments in Garden Court or of the summer home at Magnolia or in garage furnishings, effects, and equipment.

I wish to say that instead of providing for payment by my estate of rent, taxes, or other outgoings in connection with the apartments in Garden Court should my wife decide to reside there, or in connection with any other residence chosen by her or in connection with her residence in said summer home, I have decided upon the amount of the annuity and the legacies and other interests which my wife will take under my Will bearing in mind the probable expenditures which she will have to make for the above purposes and for her own living and personal expenses. This will, I think, be more satisfactory both to my wife and my trustees than if I had provided for the payment by my estate of such items and outgoings, and fixed her annuity at a smaller amount. Should my wife decide at any time not to occupy personally the said summer home and so notify my trustees, or should she not occupy the same during three consecutive calendar years, or in the event of her death my trustees may sell the said summer home and appurtenances and its furniture, furnishings and effects, automobiles, garage furnishings, effects and equipment, or may lease the same for such term from time to time and on such conditions as they think expedient; the said summer home may be sold or leased together with the furniture, furnishings, effects and equipment or parts thereof, or separately therefrom, and until sold I direct my trustees at the expense of my estate to keep the same in proper repair, but during the years of her occupancy my wife is to pay the taxes thereon.

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8. In accordance with provisions of the agreement referred to in finding 6, the executors and trustees of the estate of James Harrington Walker have followed the terms and provisions of the unexecuted will in the administration of his estate, and in accordance with the second paragraph of the unexecuted will paid to Margaret T. Walker $75,000 per year subsequent to the death of James Harrington Walker until the death of Margaret T. Walker on July 18, 1933.

9. In the year 1929 the trustees of the estate of James Harrington Walker set aside certain assets of the estate in the amount of approximately $800,000 as a separate trust fund for the purpose of making payments to Margaret T. Walker. This procedure was authorized by court order of November 3, 1928, which permitted the allocation of certain securities in the amount of approximately $800,000 to a fund to be established for the provision of an annuity of $75,000 to the widow of the deceased.

10. During 1930 Margaret T. Walker received from the trustees of the estate of James Harrington Walker the amount of $75,000. Of that amount the sum of $37,573.27 constituted all the income for the year 1930 from the assets which had been set aside as a trust fund for the purpose of making payments to Margaret T. Walker as required by the provisions of the second paragraph of the unexecuted will heretofore referred to. The balance of the payment for that year in the amount of $37,426.73 was paid out of the corpus or principal of those assets.

11. Margaret T. Walker duly filed an individual income tax return for 1930 in which she reported as taxable income the sum of $37,573.27 as income from the estate of James Harrington Walker, that amount being the income from the assets set aside in trust as shown in finding 10. In connection with that return Margaret T. Walker paid an income tax of $2,801.20 on February 26, 1931.

12. During the year 1931 Margaret T. Walker received from the trustees of the estate of James Harrington Walker, $75,000. Of that amount the sum of $21,651.32 constituted all the income for the year 1931 from the assets set aside as a trust fund for the purpose of making payments to her as

required by the provisions of the second paragraph of the unexecuted will heretofore referred to. The balance, $53,-348.68, was paid out of the corpus or principal of those assets.

13. Margaret T. Walker duly filed an individual income tax return for the year 1931 in which she reported as taxable income the sum of $21,651.32, the income from the estate of James Harrington Walker, referred to in finding 12. In connection with that return Margaret T. Walker paid an income tax of $950.11 in two installments, namely, March 17, 1932, $237.53; June 9, 1932, $712.58.

14. February 21, 1933, Margaret T. Walker filed a claim for refund of income tax for 1930 in the sum of $2,801.20 and assigned the following basis for such claim:

> Deponent disclosed a net taxable income for the calendar year 1930 in the amount of $36,645.49. In determining this amount deponent erroneously included as income from the Estate of J. H. Walker, Walkerville, Ontario, the sum of $37,573.27, which amount was not in fact taxable income to deponent, but constituted a return of capital instead. This was the amount paid currently in the form of an annuity from the said estate, the said annuity arising by virtue of the Last Will and Testament of J. H. Walker, deceased, and certain agreements between the heirs and legatees of said estate. A copy of a Departmental letter, bearing date of February 11, 1933, bearing symbols IT: AR: D-2; MHP, is attached hereto and made a part hereof.
>
> As a result of the elimination of said sum of $37,-573.27 claimant derived no taxable income, and no tax in fact is due.

The Departmental letter attached to that claim which suggested the filing of a claim for refund in order to protect her against the expiration of the statute of limitations read in part as follows:

> The determination of your income-tax liability for the year 1930 indicates an overassessment in the amount of $2,801.20, the basis of which is as follows:
>
> Taxable income from the Estate of J. Harrington Walker was reported on your return for the year 1930 which income appears to be taxable income to the Estate of J. Harrington Walker in accordance with General Counsel Memorandum 8668.

15. April 6, 1933, Margaret T. Walker filed a similar claim for refund of income tax for 1931 in the amount of $950.11. That claim was likewise filed in response to the suggestion of the Commissioner that a claim be filed in order to protect her against the expiration of the statute of limitations and suggested a similar basis for overassessment.

16. March 28, 1934, the Commissioner notified plaintiffs that the claim of Margaret T. Walker for 1930, heretofore referred to, would be rejected and on June 16, 1934, that claim and the claim for 1931 were rejected. No payment of these claims or any part thereof has ever been made by the Commissioner.

17. March 15, 1931, the trustees for the estate of James Harrington Walker filed a fiduciary return for that estate for the year 1930. They did not include in that return any part of the amount of $37,573.27, being that portion of the $75,000 paid by them to Margaret T. Walker during that year and representing the income from assets placed in trust for the purpose of making that payment.

18. March 11, 1933, the Commissioner notified the trustees of the estate of James Harrington Walker of a deficiency in income tax for the year 1930 of $3,140.99. In a statement attached to that deficiency notice it was stated that the deficiency resulted from the inclusion in taxable income of the amount of $37,573.27 heretofore referred to, since information on file in the Commissioner's office indicated that that amount reported on the return of Margaret T. Walker represented income taxable to the estate of James Harrington Walker.

19. May 8, 1933, the trustees of the estate of James Harrington Walker filed a petition with the United States Board of Tax Appeals seeking a redetermination of the deficiency referred to in the preceding finding. That proceeding was terminated by a decision by the Board of Tax Appeals entered February 28, 1934, finding no deficiency in income tax and no overpayment for the year 1930, which decision was entered pursuant to a stipulation filed on behalf of the respective parties.

20. March 15, 1932, the trustees of the estate of James Harrington Walker filed their fiduciary income-tax return

for 1931. They did not include in that return any part of the amount of $21,651.32, being that portion of the $75,000 paid to Margaret T. Walker in that year and representing the income from assets placed in trust for the purpose of making that payment, and they have not paid any income tax on such amount.

21. The income taxes as paid by Margaret T. Walker for the years 1930 and 1931 in the amounts of $2,801.20 and $950.11, respectively, were due and payable in any part only by reason of the inclusion in her taxable income for those years of the amounts of $37,573.27 and $21,651.32, respectively, being the portions of the payments received by her for those years which constituted income from the assets set aside by the trustees of the estate of James Harrington Walker for the purpose of making such payments.

The court decided that the plaintiffs were entitled to recover three thousand seven hundred fifty-one dollars and thirty-one cents ($3,751.31), with interest at the rate of six per cent per annum as follow: on $2,801.20 from February 26, 1931; on $237.53 from March 17, 1932; and on $712.58 from June 9, 1932, to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of subsection (b), section 177, of the Judicial Code, being a part of the Revenue Act of 1928. (47 Stat. 791.)

GREEN, *Judge*, delivered the opinion of the court:

This is a suit brought for the recovery of income taxes with interest thereon for the years 1930 and 1931 alleged to have been erroneously assessed and collected from Margaret T. Walker.

Margaret T. Walker died in 1933 and plaintiffs are her executors. Her husband was James Harrington Walker, who died December 16, 1919, leaving a will. The will was probated in Wayne County, Michigan, on February 25, 1920, and the executors named therein having duly qualified were appointed trustees thereunder.

The beneficiaries of the estate of Margaret T. Walker and also the beneficiaries of the estate of James Harrington Walker are named in Finding 4.

The second provision of the will of James Harrington Walker, set out in Finding 5, directed his trustees to set apart sufficient of the assets of his estate to pay his wife out of the income thereof the sum of $50,000 per annum during her life and also made other provisions in her behalf.

It appears that shortly prior to the death of James Harrington Walker a new will had been prepared but he died before having an opportunity to execute it. His heirs, believing that this unexecuted will expressed his final intentions, on December 28, 1919, entered into and executed an agreement that the provisions of the unexecuted will should be carried out after the existing will was probated. This agreement is set out in full in Finding 6.

The provisions of the unexecuted will so far as material to this action are set out in Finding 7 from which it will be seen that it directed the trustees to pay to the testator's wife, Margaret T. Walker, an annuity of $75,000 a year during her life and to set apart such a sum from his estate as would provide amply therefor.

In 1929 the trustees of the estate of James Harrington Walker, with the approval of the court, set aside certain assets in the amount of $800,000 as a separate trust fund for the purpose of making the payments of $75,000 a year to his wife. During the years 1930 and 1931, Margaret T. Walker received $75,000 a year from the trustees of the estate of James Harrington Walker. These payments were derived partly from the income on the fund set apart for the payment of the annuity and partly from the corpus of the fund.

For the years 1930 and 1931, Margaret T. Walker reported as taxable income on her individual income tax return the portion of the annuity payment received each year which represented income earned by the fund set aside to make payment thereof. The entire income tax paid by her for the years 1930 and 1931 resulted from the inclusion in her return as taxable income the income of the trust fund. In due time, Margaret T. Walker filed claims for refund of the amount so paid on both the 1930 and 1931 income tax, alleging that the amount returned as paid out of income was erroneously included in her income tax returns for these

years, being in fact the payment of an annuity to her as legatee and therefore not taxable. On behalf of the defendant it is argued that the widow was a beneficiary of a trust and not a legatee. This constitutes one of the issues in the case.

In defendant's argument it is said that "the whole question turns upon whether the widow can be considered as taking under the will of her husband or under a subsequent agreement." On this point we think there is no substantial difference between the provisions of the will and those of the unexecuted will put in force by the agreement. The will provided that sufficient be set apart out of the assets (corpus) of the estate to amply provide "funds and income" to make the annual payment of $50,000. Defendant contends that the payments were only to be made "out of the income" of the fund set apart, but the intent of the will was that an "ample fund" be set apart for that purpose and we think they were payable out of the assets of the estate if the trustees disregarded the terms of the will by not setting aside an ample fund. The unexecuted will made substantially the same provisions, referring to the payment of $75,000 a year to the widow as an "annuity." Under either the executed or unexecuted will, we think there was a charge on the whole estate for the annual payment to be made to the widow. Clearly this was the case under the unexecuted will which provided for the payment of an annuity in the amount of $75,000 and made a special provision that any deficiency of income should be made up out of the corpus of the assets set apart. In fact a part of the annuity was paid under this provision.

Where annual payments are made by the fiduciary of a trust under a will and such payments do not depend upon income from the trust estate but are payable without regard to the income received by the fiduciary, they are made in discharge of a gift or legacy and are not taxable. *Helvering* v. *Butterworth*, 290 U. S. 365, 370; *Burnet* v. *Whitehouse*, 283 U. S. 148, 151.

It is argued on behalf of defendant that under the executed will the widow occupies the status of a beneficiary of a trust and the amounts received by her as income from the trust

constitute taxable income to her. It is also said that if anything was received by her in addition to what she was entitled to under the will, such amounts should be considered as received contractually from the heirs.

What we have said above shows, as we think, that the widow was not a mere beneficiary of a trust created for her benefit but was, under the requirement of the will that a certain sum be paid to her annually as an annuity, a legatee and that the exemption of her annuity from taxation was not altered by the agreement executed by the heirs.

Defendant cites in support of its contention the case of *Lyeth* v. *Hoey*, 96 Fed. (2d) 141, in which there was a contest over the provisions of a will. The heirs entered into an agreement providing for the probate of the will and the distribution of the estate in accordance with the will and an agreement of settlement between them. The plaintiff acquired property under the compromise agreement which he would not have received under the terms of the will as originally offered for probate. On this property he was assessed and paid income taxes which he sought to have refunded. The Circuit Court of Appeals held that the property so received and assessed was income under the meaning of section 22 of the revenue act of 1932, 47 Stat. 169, 178, and consequently taxable. On appeal this decision was reversed by the Supreme Court in *Lyeth* v. *Hoey*, 305 U. S. 188, and it was held that a settlement of an estate which provides for the probating of a will does not do away with statutory exemptions, also that what the plaintiff received by virtue of the agreement over and above what he would have got under the will, he received because of his standing as an heir and his claim in that capacity. The claim of the plaintiff that what he received was exempt from tax was therefore sustained.

The case before us is somewhat different in its facts but the case last cited settles some of the controversies we are now considering. Under the rules laid down therein, the fact that annual payments were made to Mrs. Walker by virtue of an agreement under which she received more than she would have under the executed will would not prevent the payments made from being exempt if she was an

heir, as in fact she was. In the instant case there was no legal conflict between the heirs. The settlement agreement was voluntary and amicable. Under these circumstances, we think that whatever additional amount she received under the agreement was merely a gift and consequently not taxable. In any event being an heir in fact, we think there is no substantial difference in the effect of the agreement in the instant case from that made in *Lyeth* v. *Hoey*, *supra*, and that she was consequently entitled to hold all she received thereunder free from tax.

Our conclusion is that none of the reasons presented on behalf of defendant for requiring Mrs. Walker to pay an income tax on the payments received by her are well founded. We are of the opinion that there is no substantial difference between the provisions of the original will and the unexecuted will with reference to the payments being a charge upon the whole estate of her husband; that even if the will which was probated does not have this effect the agreement made by the parties to put in force the unexecuted will is controlling and under it the annual payments made to the widow were a charge upon the whole estate. There was, as we view it, an annuity payable to the widow which did not depend upon income from the trust estate. This annuity was granted to her by a legacy and as legatee she was not subject to a tax by reason of receiving it.

The defendant also contends that even if no part of the payments received by Mrs. Walker constituted income taxable to her no refund should be allowed to the plaintiffs. In support of this contention the defendant cites the case of *Stone* v. *White*, 301 U. S. 532, in which the Supreme Court held that where the income of a trust was taxed to the trustee when it should have been taxed to the beneficiary the trustee could not recover the tax paid by him. In the *Stone case*, *supra*, the beneficiary was entitled to the whole net income of the trust and the Government was permitted to interpose a defense of equitable estoppel because, as is pointed out by the court, any recovery obtained by the trustee would inure entirely to the benefit of the beneficiary who should have paid the tax in the first instance.

In the case before us there was no obligation on the part

of Mrs. Walker to pay the tax and her recovery would inure to her benefit alone without affecting the interests of the heirs of her husband.

It should be said also that recent cases have placed a limitation on the rule laid down in *Stone* v. *White*, *supra.* In *Sewell* v. *United States*, 19 Fed. Supp. 657, it was held that it did not apply where the beneficiary was entitled to only part of the net income and the balance was retained in the estate for the benefit of the remainderman. In the case of *McNaughten* v. *United States*, 84 C. Cls. 349, attention was called to the fact that in the case of *Stone* v. *White*, *supra*, the Commissioner determined and assessed the tax there involved in accordance with the decision of the Circuit Court of Appeals which decision was later reversed, while in the case then being submitted the Commissioner was bound by no interpretation of the law, except his own, with respect to the question before him, and all of the facts necessary to a determination and assessment of taxes against the trustees and beneficiaries were fully known before any statute of limitations ran against the assessment of the tax against the trustees. It was held in the *McNaughten case*, *supra*, that when the Commissioner neglected properly to assess the tax and permitted the limitation statute to run, there was no equitable estoppel.

The same situation existed in the case now before us. Before the statute of limitations had run, the Commissioner had advised Mrs. Walker to file a claim for refund. With a full understanding of the matter he determined to assess the tax involved herein to Mrs. Walker.

Since the filing of the refund claims on which the action is based Mrs. Walker died. If this suit is successful, the recovery will go to the heirs of her estate and the beneficiaries of her estate are a part but not all of the beneficiaries of the estate of James Harrington Walker. These facts show merely an undetermined advantage derived through the failure of the trustees of James Harrington Walker to pay the tax, which is insufficient to warrant the application of the doctrine of equitable estoppel. See *Schlemmer* v. *United States*, 94 Fed. (2d) 77, in which the case of *Stone* v. *White* was distinguished.

It follows from what is said above that plaintiffs are entitled to recover $2,801.20 taxes for the year 1930 paid on February 26, 1931, and $950.11 taxes for the year 1931 paid in two installments, namely, March 17, 1932, $237.53, and June 9, 1932, $712.58, with interest as provided by law upon the several sums so paid. Judgment will be rendered accordingly.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

LOUIS J. MEADER AND CHARLES B. COX, AS ADMINISTRATORS OF THE ESTATE OF HERMAN LEE MEADER, DECEASED, v. THE UNITED STATES

[No. 42884. Decided April 3, 1939]

On the Proofs

Estate tax; valuation of leasehold.—In arriving at the determination of the values of leaseholds, for estate tax purposes, the date of the death of the decedent is to be taken as the date of valuation.

Same.—The value of a leasehold, even if it has only a short period to run, may be increased by an option to renew.

The Reporter's statement of the case:

Mr. Maurice Kay for the plaintiff.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiffs are citizens of the United States and reside in New York City. They sue in their capacity as administrators of the estate of Herman Lee Meader, who died February 14, 1930.

Reporter's Statement of the Case

2. Plaintiffs filed an estate-tax return for the estate of Herman Lee Meader on September 4, 1930. The return disclosed a gross estate of $1,233,899.04, deductions of $197,-486.90, and a net estate of $1,036,412.14. The total Federal estate tax shown due was $51,112.97, but a credit was taken in the amount of $40,890.37 for New York State inheritance taxes paid. The net Federal estate tax in the amount of $10,222.60 was paid on February 10, 1931.

3. The major asset of this estate consisted of 1,000 shares of stock in Lee Meader, Inc., a personal holding corporation, in which Herman Lee Meader owned all of the stock at the time of his death. Lee Meader, Inc., owned all of the stock of the 32nd–33rd Street Corporation. The chief asset of the last named corporation was a leasehold on a building known as the Waldorf building hereinafter referred to.

4. On October 29, 1913, a lease was entered into between William Vincent Astor and the 32nd–33rd Street Corporation covering a large irregular lot on the south side of 33rd Street near that street's intersection with Fifth Avenue in New York City. On March 31, 1914, a lease was entered into between the Brown estate and the 32nd–33rd Street Corporation covering a lot adjoining the Astor lot.

The leases provided for the erection of a tentatively agreed upon store, office, and loft building on the leased properties. Title to the building known as the Waldorf building was to vest immediately in the lessors. To the construction of this building William Vincent Astor was to contribute $562,500 and the Brown estate was to contribute $170,000. The lessee, 32nd–33rd Street Corporation, was to contribute $700,000, of which $150,000 was raised by the sale of bonds drawing 6% interest per annum. Herman Lee Meader bought these bonds and owned them at the time of his death.

5. The aforesaid leases were for a term of twenty years and contained three options to renew for a like term, each term to commence, if the option was exercised, from the date of the expiration of the expired term.

The net rental to be paid annually to William Vincent Astor during the first term of twenty years was $121,250,

and the net rental to be paid annually to the Brown estate during the first term of twenty years was $22,000. Under the terms of the leases, the lessee was further obligated to pay all taxes, assessments, water rents, insurance, and other payments that might accrue upon or about the properties.

If the option to renew the leases was exercised the properties were to be reappraised and the rentals to be based upon such reappraised values, but the annual net rentals to the lessors was not to be less than the annual net rentals paid during the previous twenty-year term.

6. The Waldorf building erected under the terms of the leases was a twelve story, store, office, and loft building and was completed in the early part of 1915. The building was of fireproof construction, steel and concrete, faced with brick and stone. It was completely modern and in good condition on February 14, 1930. In 1914 and 1930 the assessed valuation of the land on which the building was erected was $1,600,000 and of the building $1,100,000. The building was well rented at decedent's death to a capacity of more than 90 per cent, which condition had existed with minor changes for at least 4 or 5 years prior to that time.

7. The annual gross rental received by 32ND–33RD Street Corporation from 1925 to 1930, inclusive, and the net income of that corporation for the same period were as follows:

	Gross Rentals	Net Income
1925	$429,059.87	$44,601.07
1926	380,791.17	43,171.95
1927	393,399.15	30,767.01
1928	394,466.86	33,495.76
1929	394,471.81	28,157.52
1930	440,511.19	59,994.13

The principal source of income to the corporation was the leasehold on the Waldorf Building. In each year the corporation took a deduction of $26,000 as amortization of its cost of the leasehold, that is, the amounts contributed by it to the construction of the building, and also a deduction of $20,000 as salary to the decedent and both of these deductions were taken in arriving at the net income figures set out above.

Reporter's Statement of the Case

8. After the death of the decedent on February 14, 1930, his administrators employed appraisers to appraise the assets included in his estate. To appraise the real estate, stocks and bonds, they employed an appraisal firm in New York City which had been engaged in that work for many years, and that concern assigned to the work a man who had been engaged in real estate work in New York City since 1912 and had been with the firm for several years. In arriving at the value of decedent's stock in his personal holding company it became necessary to value the leasehold interest heretofore referred to, and the appraiser fixed a value for that leasehold interest as of February 14, 1930, of $775,000. His appraisal was completed prior to, and submitted to decedent's administrators on, or about, May 6, 1930. One of the administrators is a real estate broker who had been connected with the decedent's enterprises for many years, a part of which time he was an officer of the 32ND–33RD Street Corporation.

Decedent's administrators accepted the appraisal without question or protest and used the values fixed by that appraisal for both Federal estate, and New York State inheritance-tax purposes. After an examination of the Federal estate-tax return the Commissioner accepted the values for the leasehold as fixed by the appraiser and submitted by plaintiffs.

9. August 30, 1932, plaintiffs filed a claim for refund of $7,000 on the following ground:

> Value of property assessed was erroneously computed by Samuel Marx, Inc., appraiser. The stock of 32nd–33rd Street Corporation was appraised at $1,108,040.08. The amount that stock should have been appraised for should be $200,000. The reason for the error was due to the failure of the appraiser to read the terms of the lease, the principal asset of the estate, which lease expired with three years. Instead the appraiser assessed the value as though the lease expired eighty years from the time appraised.

The Commissioner rejected that claim March 9, 1933.

10. The evidence submitted by plaintiffs is insufficient to show error in the Commissioner's determination of the value of the leasehold.

The court decided that the plaintiffs were not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

The plaintiffs bring this suit to recover the estate tax paid on leaseholds which are claimed to have been overvalued by the Commissioner of Internal Revenue.

The real question involved is whether the evidence submitted by the plaintiffs overcomes by its preponderance the valuation determined by the Commissioner of Internal Revenue on these leaseholds.

The facts have been found with minute detail and with full particularity. It is only necessary for a full understanding of the situation to state that Herman Lee Meader was the owner of the stock of a personal holding company and died on February 14, 1930, leaving these shares as a part of his estate. Among the assets of one of the corporations whose stock was held by the holding company were two leases on the Waldorf building situated on 33rd Street in the city of New York. At the date of his death the leases had run for approximately 16 years of the 20-year period but there was a provision in the leases for a renewal at the expiration of the first period for an extended period of 20 years and for two other renewals of a like number of years. Of the total cost of this building, the corporation had contributed $550,000.00 in cash and had issued bonds at 6% for $150,000.00. When the decedent died the money contributed by the corporation in cash had been returned to the extent of some $400,000.00 by yearly amortization. Besides this amount a salary of $20,000 a year was charged for Meader's services and interest on the bonds paid and all other expenses of maintaining the building as a rental property.

After his death, his executors, plaintiffs in this case, employed an expert real estate firm to make an appraisal of these leases and in May 1930 a report was made by this appraiser valuing the leases at $775,000.00. In arriving at this valuation, the unexpired period of the first term and the first renewal period of 20 years were taken into consideration. In making that valuation the appraiser used

average annual earnings from the leaseholds for the years prior to the decedent's death of $61,000, which was conservative since the net earnings set out in our findings take into consideration a deduction of $26,000 annually for the amortization of the cost of the leaseholds which of course should be added to the net earnings shown. It should be observed further that the net income for 1930 was $59,994.13, which, when increased by the amortization deduction of $26,000, would show net income for that year, which was the year of decedent's death, of approximately $86,000. The plaintiffs used this appraisal in making a return to the State of New York for inheritance tax purposes and furnished it to the Commissioner of Internal Revenue for Federal estate tax purposes.

The Commissioner of Internal Revenue had an expert to make a detailed examination of the value of these leaseholds as submitted by plaintiffs and he approved plaintiffs' valuation. The New York State inheritance tax was paid and taken as a deduction against the Federal estate tax and the plaintiffs paid a Federal estate tax of $10,222.60. These events occurred shortly after the basic date on which the valuation is required to be fixed, that is, February 14, 1930, the date of the death of the decedent.

It was not until August 30, 1932, that plaintiffs filed a claim for refund on the ground that the assessment made on the basis of the appraiser's valuation was erroneous, claiming that the appraiser should not have taken into consideration the first renewal period of 20 years. After due consideration the Commissioner disallowed the claim.

This case was tried in 1936 and both the appraiser for the estate and the appraiser for the Commissioner of Internal Revenue testified that the values placed on these leases were the true market values at the time of the death of the decedent. One of the plaintiffs herein is a real-estate dealer in the City of New York, well acquainted with values of property, and he accepted the appraisal made by the appraiser for the estate, furnished it to the State of New York for inheritance tax purposes and also to the Commissioner of Internal Revenue for the purpose of establishing a value on these leaseholds.

The evidence discloses that the highest rentals and the largest net revenue were received during the year 1930 and that the real-estate market did not begin to decline because of the depression until about 1931. The proof shows that the testimony of the plaintiffs' witnesses was affected by what happened in the years following 1930 when the world-wide depression caused real-estate values to shrink abnormally.

In our opinion, the preponderant weight of the evidence is in favor of the Commissioner of Internal Revenue in the valuation placed by him upon the leases in making his determination.

There remains only the question of whether the plaintiffs' appraiser was justified in taking into consideration, in arriving at the value of these leaseholds, the renewal period of 20 years, or was he confined solely to the value of the leases for the remaining years of the first period.

The plaintiffs have cited many cases but we do not think these cases sustain their position. None of them is apposite.

In *Bonwit Teller & Company* v. *Commissioner of Internal Revenue*, 53 Fed. (2d) 381, 383, it was held that in allowing deductions on account of amortizing the cost of a leasehold, the cost should be amortized over the original term of the lease but the court also held:

> Despite the uncertainty of the rental to be paid during the extension, the option may give additional value to the lease, just as many other types of provisions might give the lease value.

The history of the rental values of this property shows that at the time of the death of the decedent, if continued at their present rate, they would have amortized the $550,000 contributed by Meader by the end of the original term. With the recovery of this sum the renewal period would have an additional value over that of the original term. It actually shows that the leaseholds were valuable and paying propositions and the renewal period was a valuable asset to the estate which could have been disposed of in the active real-estate market which existed at that time.

Plaintiffs' whole case is based on what occurred after 1930 in the declining real-estate market but we are concerned only with the value of the leaseholds as of the 14th of February 1930. What occurred afterwards sheds no light on what was the real value on the day of the death of the decedent and the evidence clearly shows that, judging the future by the past, the renewal period of these leaseholds would be very valuable to the estate. In *Ithaca Trust Company* v. *United States*, 279 U. S. 151, 155, the court said:

> * * * Therefore the value of the thing to be taxed must be estimated as of the time when the act is done. But the value of the property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. See *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 222. Like all values, as the word is used by the law, it depends largely on more or less certain prophecies of the future; and the value is no less real at that time if later the prophecy turns out false than when it comes out true. See *Lewellyn* v. *Electric Reduction Co.*, 275 U. S. 243, 247; *New York* v. *Sage*, 239 U. S. 57, 61. Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done, * * *.

See also *719 Fifth Avenue* v. *United States*, 78 C. Cls. 707, 713, in which it was held

> * * * The amount subsequently received by the plaintiff for rentals and its net income from the premises are not admissible as evidence of the value of its leasehold interest on March 1, 1913. The plaintiff was taking some risk when it executed the lease and naturally expected if matters went well to receive a profit. No one would otherwise lease the premises and agree to put up an expensive building.

In our opinion the Commissioner was correct in arriving at his determination of the values of the leaseholds on the date of the death of the decedent.

The petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

AMOS TYREE v. THE UNITED STATES

[No. 43092. Decided April 3, 1939]

On the Proofs

Government contract; breach.—Where plaintiff entered into a contract with the Government, through the Civil Works Administration, in response to invitation for bids, to supply and to make available certain quantities of clay, from which plaintiff at his expense removed the overburden of sand; and where the Government, after having called for, loaded, and hauled away from plaintiff's clay pit a portion of the total amount which the Government had agreed to take and pay for, canceled the contract, it is held that this constituted a breach of the contract for which the plaintiff is entitled to recover.

Same; measure of damages.—Where plaintiff had performed his part of the contract by removing the overburden from the clay, and making the clay available for removal by defendant, the measure of plaintiff's damages upon breach of the contract is the difference between the unpaid contract price and the fair value of the clay which the defendant refused to take.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *Messrs. King & King* were in the brief.

Mr. Henry A. Julicher, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. During, and since, 1933 and 1934 plaintiff was, and still is, a resident of De Soto City, Highlands County, Florida, and the owner of 450 acres of land in Section 16, Township 35, Range 29 East in Highlands County upon which was located a clay deposit which was suitable and had been used for road building, and which had been partially developed prior to the making of the contracts hereinafter mentioned. There was no other clay pit within sixteen miles, the nearest one being at Avon Park, Florida.

Early in 1934 the United States, through the Federal Civil Works Administration, entered upon certain road

building projects near plaintiff's clay pit. The division engineer of the Federal Civil Works Administration, representing the defendant, called upon plaintiff and interviewed him in order to ascertain whether his clay deposit could be made available for use on the road building projects. Plaintiff's clay was partially exposed on one side, but otherwise was covered by about 15 feet of sand overburden. The normal sand overburden of the clay in question, and in that immediate vicinity, was about 8 feet in depth but the particular vein or deposit from which the defendant was interested in obtaining clay for use on road building projects at that time, and at the time the contracts hereinafter mentioned were entered into, contained an additional overburden of sand of about 7 feet which apparently had resulted from the fact that in previous operations near by the spoil material or sand overburden, had been dumped or piled over the clay deposit with which we are here concerned. In order to make this clay available for delivery to the Government, it was necessary for plaintiff to remove this entire overburden and expose the clay in such manner that it could be easily loaded free of sand by the Government into its trucks. Upon inspection of the clay deposit in its condition before any of the overburden had been removed, the engineer of the Civil Works Administration representing the defendant expressed doubt as to whether plaintiff would be justified in undertaking to remove the sand overburden from the clay; in other words, whether plaintiff would be justified in undertaking to do so for a price for the clay which the Government might be willing to pay. Plaintiff's ability to remove the overburden was expressly conceded. In addition, the executive officer and director of the Federal Civil Works Administration at that time also made an examination of the clay and of the conditions existing. Plaintiff assured these representatives of the defendant that if the Government desired the clay and would give him a contract for a considerable quantity thereof he would remove the entire overburden therefrom and make the clay available to the defendant in the manner desired. Upon these inspections the division engineer and the executive officer of

the Federal Civil Works Administration did not specify any amount of clay which the Government would require but stated that the Government had two or three projects and would need a considerable quantity of clay. These representatives on that occasion examined the clay and took samples thereof.

2. Soon thereafter, and on January 13, 1934, the defendant, acting through the Federal Civil Works Administration, at Sebring, Florida, prepared, issued, and delivered to plaintiff a printed form of invitation for bids properly filled in with five specific specifications calling for bids to be submitted on or before 10 A. M., January 15, 1934, for 2,000 cubic yards of clay as per specifications in one case and 7,000 cubic yards of clay, as per specifications, in the other case, the specifications being the same in both cases. The price bid by plaintiff in each case was $0.3499 a cubic yard, or a total of $689.80 for the 2,000 cubic yards and a total of $2,449.30 for the 7,000 cubic yards. These invitations for bids upon which plaintiff entered his bid price for the quantities of clay specified, and which he signed and returned to the proper official of the Federal Civil Works Administration, were, upon receipt, accepted and approved by the Federal Civil Works Administration on January 25, 1934. These invitations of the Federal Civil Works Administration, the plaintiff's bids, the specifications, and the terms and conditions of the contract between the parties are in evidence as plaintiff's exhibits 1 and 2 and are made a part hereof by reference.

The specifications set forth in these two invitations for bids which became the contracts between the parties, so far as material here, were as follows:

> 1. FLORIDA CLAY.—To be what is known as first-class Florida Clay, acceptable to the local CWA, of a consistency to properly pack in road construction; excessive percentage of sand not permitted.
>
> 2. OVERBURDEN.—To be removed by the bidder, and the ledge of clay to be kept free from sand.
>
> 3. DIMENSIONS OF VEIN.—To average not less than five (5) feet in thickness and lie sufficiently above water to be readily accessible for excavating and loading.

4. ROADS.—Roads for ingress and egress, of suitable character for truck traffic, to be constructed and maintained by the owner of the pit at his expense.

5. LOCATION OF PIT.—Bidder must state location of his pit.

In submitting his bids for the quantities of clay called for, plaintiff set forth in his bids made upon the invitations furnished by the defendant (which bids and invitations, together with the specifications above quoted, became contracts between the parties), that "My pit is located in SE quarter Sec. 16, T. 35, R. 29, E. The vein averages 9 feet in thickness and the clay on which this bid is based can be made available at once after acceptance of bid."

At the bottom of the defendant's invitations for bids on which plaintiff entered his bid price, and on which appeared the terms, conditions, and specifications above quoted, all of which were duly signed by plaintiff on January 15, 1934, there appeared the following:

> The United States Government, acting through the undersigned officer or agent of the Federal Civil Works Administration, hereby accepts the foregoing proposal except for the articles which have been stricken out, this acceptance to constitute a binding contract.

Below this provision was entered the acceptance and approval of the Federal Civil Works Administration by C. G. Ware, Purchasing Agent.

3. Thereafter, on February 7, 1934, the Federal Civil Works Administration prepared and issued a third invitation for bids on Standard Government Short Form Contract for 2,839 cubic yards of "clay, unit of measurement to be the cubic yard computed by recording the number of truck loads taken; each truck to be measured and its size used in computing and arriving at the total amount of clay moved therewith; clay to be measured in the loose state when loaded in the trucks." Upon the invitation so issued and delivered, the plaintiff on February 7, 1934, submitted his bid of $0.3499, or $993.37 for the 2,839 cubic yards called for which he agreed to make available for removal by defendant at once upon receipt of order. All deliveries under the three contracts were to be f. o. b. pit. Plaintiff also agreed to the terms of

this invitation calling for a discount of 3% for payment in 10 days, 2% in 20 days, or 1% in 30 days. Upon receipt of the return of this contract form and the invitation for bid on which plaintiff entered his bid, the Federal Civil Works Administration, by C. G. Ware, Purchasing Agent, accepted and approved the contract on February 12, 1934. This contract is in evidence as plaintiff's exhibit 3 and is made a part hereof by reference.

4. The reasons for issuing three invitations for bids and making separate contracts for the number of cubic yards of clay specified in each were, among others, that each project entered upon by the Federal Civil Works Administration is maintained and handled separately from other projects for the purpose of keeping accurate accounts of costs of labor and material; that if the material needed and acquired for one project is not all used in connection with that project an order may be made transferring such material to another project so that an accurate record and account thereof may be kept in connection with the project to which transferred; also for the reason that the different quantities of clay specified were to be applied on different projects and used at different places.

In determining his bid price per cubic yard, plaintiff took into consideration the cost of removing the overburden and of keeping the clay deposit entirely clean of sand until the clay could be loaded, the cost of constructing and maintaining necessary roads for ingress and egress of Government trucks to and from the pit and, also, a reasonable price or profit for the clay in addition to these costs.

5. Soon after the acceptance and approval of plaintiff's bids and the signing of the contracts for the specified amounts of clay at the bid prices, the defendant through the Civil Works Administration, as was customary in such cases, issued and delivered to plaintiff upon the contracts entered into three documents entitled "PURCHASE ORDER (for use in placing orders pursuant to accepted proposals)" calling for delivery to the Civil Works Administration of De Soto City, Highlands County, Florida, f. o. b. the pit, of the number of cubic yards of clay specified in each of

the contracts hereinbefore mentioned at the unit price and for the total amount mentioned in each of the contracts. Two of these "purchase orders" or calls for the clay specified in the contract were issued and delivered on January 25, 1934, and the other on February 12, 1934. Each of these orders was issued pursuant to and in accordance with stipulations of contracts entered into between plaintiff and the Federal Civil Works Administration. They were, in effect, formal notifications of approvals of the contracts of the same dates and were calls for material in accordance with the written contracts and specifications. Copies of these documents are in evidence as plaintiff's exhibits 4, 5, and 6, and are made a part hereof by reference. The total amount of clay called for in these documents was 11,839 cubic yards, as specified in the formal contracts.

6. Upon acceptance of his bids and the execution of the first contracts on January 25, 1934, plaintiff began immediately to remove the sand overburden from the clay. He first rented a drag line or power shovel from the County with which to remove the overburden but he concluded that this machine was inadequate to accomplish the results desired. As a result, plaintiff rented a large P & H drag line with a boom or shovel arm sufficiently long to enable it to dispose of the overburden material to a distance of 100 feet in any direction. The maximum capacity of this drag line in the removal of sand overburden was three-fourths cubic yard in each operation and from 1,000 to 1,600 cubic yards a day. In actual practice, based upon past experience in such work, the average amount of material moved by such a drag line when kept in operation is from 1,000 to 1,100 cubic yards a day. In addition to the drag line, with which the owner furnished the necessary operator and employees, the plaintiff also employed day laborers to thoroughly clean the surface of the clay from which the overburden had been removed and to keep it clean and free of sand until defendant had completed removal. He also constructed and maintained the necessary roads to and from the clay pit. The vein of clay from which the overburden was removed was above water, accessible for loading, and averaged 10

feet in thickness. From time to time after the contracts were made, and until early in March 1934, the defendant brought its trucks to plaintiff's clay pit and loaded and hauled away certain of the clay for the uses for which it was purchased, and, at no time, complained in any way with reference to plaintiff's operations or the character of the clay.

Prior to the time the contracts were canceled by the defendant by the letter hereinafter mentioned, the plaintiff had no knowledge that clay, other than the amounts which had been loaded and taken up to March 1934, would not be taken. He had removed the sand from a sufficient quantity of clay by measurements made to fulfill the requirements of the three contracts involved. The clay deposit so uncovered was 150 feet or more in length. The large drag line, although not in constant operation, was maintained on the work for thirty days. All clay as required by the defendant was at all times available for removal by it.

7. In compliance with the terms and conditions of his contracts plaintiff removed the overburden from and made available to the defendant, prior to the time the contracts were canceled, clay in the amount of at least 11,839 cubic yards contracted for, and, in doing this, he incurred and paid expenses totaling $1,588.28 in the amounts of $1,100 for rental of drag line, including an operator, $340.67 for fuel, repairs, maintenance and operating costs of the small drag line rented from the County and $147.57 for day laborers in shoveling and sweeping sand from the clay deposit and keeping the same free of sand.

8. During January, February, and early in March 1934 the defendant, under the three contracts hereinbefore mentioned, called for, loaded, and hauled away from plaintiff's clay pit a total of 2,267 cubic yards of clay for which plaintiff was paid, at the unit price specified in the contract, a total of $793.22. The defendant did not call for or take away any clay during the months of April, May, or early June, 1934. Plaintiff was not advised prior to June 11, 1934, that no further clay would be taken or paid for. On June 9, 1934, plaintiff wrote a letter to the proper official of the Federal Civil Works Administration advising the defend-

ant that, although 11,839 cubic yards of clay had been contracted for, less than 3,000 cubic yards had been taken. Thereafter, on June 11, 1934, the defendant, in reply to plaintiff's letter, wrote him that no further clay would be taken and that the three purchase orders issued at the time the contracts were executed were canceled. This letter was as follows:

> Replying to your letter of June 9th relative to C. W. A. purchase orders for clay, we quote you the following from General Bulletin No. 52, issued by Julius F. Stone, Jr., State Administrator for the F. E. R. A. May 23rd, 1934:
>
> "Deliveries under contracts entered into and purchase orders placed by the Civil Works Administration prior to March 10, for materials or supplies may be accepted up to, and including May 31, 1934, as charges against Civil Works funds if the materials or supplies can be used to advantage on work division projects, and provided that the maximum allotment given to the State for materials is not exceeded thereby.
>
> "No deliveries subsequent to May 31, 1934, for other than administrative needs in completing Civil Works records, accounts and disbursements may be charged to Civil Works funds. Deliveries during May will, of course, be accepted only if the materials or supplies can be used to advantage by Emergency Relief Administrations. Deliveries of materials or supplies which cannot be used to advantage will not be accepted notwithstanding unfilled contracts and purchase orders already placed."
>
> This information is given to this State over the signature of Harry L. Hopkins, Administrator.
>
> Due to the above orders, you will understand that we can accept no further deliveries on P. O. 2638, 2626, and 4287, and those orders are hereby cancelled. In the event that we are later authorized to purchase materials, you will be given an opportunity to bid on clay purchases, if that material is used.

The letter above mentioned is in evidence as plaintiff's exhibit 23 and is made a part hereof by reference.

9. After the receipt of this letter plaintiff made demand for payment and filed a claim for the difference between the contract price and the amount paid. The claim and supporting evidence filed by plaintiff with the Federal Emergency

Relief Administration, under which the Federal Civil Works Administration operated, was referred to the General Accounting Office for direct settlement and on March 26, 1935, the Comptroller General disallowed the claim on the ground that there was no appropriation available for payment thereof and advised plaintiff as follows:

> It is contended that the Civil Works Administration ordered 11,839 cubic yards of clay, but, as less than 3,000 yards of the material were delivered, claim is now submitted for expenses incurred incident to the preparation of the site from which the clay was obtained and for injury and damage resulting from the cancellation of the purchase orders.
>
> Under section 3678, Revised Statutes, all appropriations made for the various branches of expenditure in the public service are required to "be applied solely for the objects for which they are specifically made and for no others." It appears that you have been paid for all clay delivered, and obviously there can be no payment for material not received; neither is there any authority under the appropriation involved for the payment of damages. There being no available appropriation provided for the payment of your claim, same is, accordingly, disallowed.
>
> I therefore certify that no balance is found due you from the United States.

10. Following the cancellation of plaintiff's contracts and the refusal of the defendant to accept and pay for any of the remaining clay which plaintiff had made available, and delivered within the meaning of and in accordance with the terms of the contract, the clay had no marketability—that is, no market could be found therefor from the time of cancellation of the contracts to the present time and although plaintiff made every effort to find a purchaser and to sell his clay at the best price obtainable no purchaser could be found for the quantity of clay covered by the contracts which the defendant had refused to accept and pay for. Plaintiff endeavored to sell all or a portion of this clay to the County of Highlands but was unable to do so. The most that plaintiff was able to do in the matter was to sell a few truck loads of the clay to certain individuals for which he charged and received thirty-five cents a cubic yard and

in connection with which sales he incurred the expense of digging and loading the clay. It does not appear that plaintiff made any profit on these small transactions. Subsequent to the cancellation of the contracts the banks of sand adjacent the uncovered clay caved in, due to weather conditions, and a considerable amount of sand fell back upon the exposed clay. In addition, high winds blew sand back upon the clay. This condition caused a considerable area of the clay deposit to again become covered with sand to a depth of from two to three feet near the edges to a few inches over other portions. The areas of the clay deposit which remained exposed to the rain and sun became hardened for several inches in depth so that in loading the trucks in connection with the small amount for which plaintiff was able to find purchasers, he found it necessary to use dynamite to break through the hardened upper crust.

11. The total contract price for the 11,839 cubic yards of clay purchased by the Government was $4,142.47. The Government accepted and removed 2,267 cubic yards for which it paid plaintiff a total of $793.22 at the unit price agreed upon. The unpaid balance called for by the contracts is $3,349.25.

12. At the time of or shortly before the contracts were canceled by defendant certain marl beds were discovered and uncovered in the vicinity of plaintiff's clay pit. This marl material was suitable and was used by defendant and others for road building purposes. It was cheaper than clay because it was more plentiful and because it could be uncovered and loaded at less expense. This affected the market value of plaintiff's clay for road building purposes, which was the only purpose for which it possessed a value. Although there was no market or a readily realizable market price for plaintiff's clay at the time of the defendant's breach of the contracts, such clay had some value. Upon the cancellation of the contracts the fair market *value* of the clay in the quantity of 9,572 cubic yards, which defendant refused to take, did not exceed five cents a cubic yard f. o. b. pit, or $468.60. The unpaid contract price of $3,349.25 less this total market value is $2,880.65.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

It is clear from the facts that the defendant breached its contracts with plaintiff and that the letter of June 11, 1934, was a direct cancellation thereof. This cancellation was not in accordance with any provision reserved in any of the contracts and the defendant's refusal to accept and pay for the remaining 9,572 cubic yards of clay constituted a breach.

Plaintiff seeks to recover the amount of $3,339.25, being the difference between the total contract price and the amount paid by defendant for the clay removed, and relies upon the case of *Purcell Envelope Co.* v. *United States*, 51 C. Cls. 211, affirmed 249 U. S. 313. In that case this court held that actual damages clearly include the direct and actual loss which the plaintiff sustains. In that case this court gave judgment for the plaintiff for the difference between the price fixed in the contract for certain envelopes and newspaper wrappers which it agreed to furnish and the cost of furnishing them after making a reasonable allowance for less time engaged and for release from the care, trouble, and responsibility attending a full and complete execution of the contract. Applying that rule here, where the material which was made the subject of the contract was in existence and in possession of plaintiff at the time of the breach, plaintiff's measure of damage is the difference between the contract price for the remaining clay which defendant declined to take and the fair market value thereof. In *Swift & Company* v. *United States*, 59 C. Cls. 364, 437, this court said:

> As against this gross amount the plaintiff must, of course, be charged with the net amount realized or the amount which should have been realized from the sale of the bacon, * * *. No doubt, but for one very material fact, the measure properly to be applied to this side of the account would be "market value," but the material fact is that there was no market value in the true sense. This was not a commercial product, there was but one customer, and when that customer declined to take it there was no market except as it might be created.

This decision was affirmed in *United States* v. *Swift & Co.*, 270 U. S. 124, in which the court said, at page 149:

> This was a case where the only standard could be the contract price and the amount realized at actual sale by diligent effort. The rule is that where there is no general market or the merchandise is of a peculiar character and not staple, it is necessary that some other criterion be taken than the difference between the agreed price and the general market value.

In *Baker Food Products Co.* v. *United States*, 75 C. Cls. 591, 598–603, we held that the measure of damage for a breach of contract for certain canned beef was the difference between the contract price and the fair market value to the plaintiff even though there was no determinable market price and the article was not, at the time of the breach of the contract, readily salable in the market for any determinable market price. Plaintiff in that case submitted evidence to show the reasonable and fair market *value* to him of the product which the defendant refused to take and the court fixed the value on this basis although it was necessary in order to handle or dispose of the product for the plaintiff to rework it. See, also, *Manowitz* v. *United States*, 66 C. Cls. 247; *Electric Boat Co.* v. *United States*, 66 C. Cls. 333; *Bradley* v. *United States*, 66 C. Cls. 551; *Harrisburg Pipe & Pipe Bending Co.* v. *United States*, 67 C. Cls. 138; *Fain Grain Co.* v. *United States*, 68 C. Cls. 441; *Briggs & Co.* v. *United States*, 74 C. Cls. 347.

In the case at bar plaintiff had performed his part of the contract by removing the overburden from the clay and making the same available for removal by defendant, and his measure of damages upon breach of the contract is clearly the difference between the unpaid contract price and the fair value of the clay which the defendant refused to take. Upon the whole record it appears that at the time of breach of the contracts in the circumstances then existing the fair value of the remaining 9,572 cubic yards of clay called for by the contract was not more than five cents a cubic yard, and we have so found. Judgment will therefore be entered in favor of plaintiff for $2,880.65. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAM H. GRIFFIN v. THE UNITED STATES

[No. 43283. Decided April 3, 1939]

On the Proofs

Salary of administrative office; discretion of Administrator under National Industrial Recovery Act.—An act of Congress having left it solely within the discretion of the Administrator to appoint, fix the term of office and the salary to which each appointee was entitled, and that discretion having been exercised, it is held not reviewable by the court.

The Reporter's statement of the case.

Mr. William H. Griffin, pro se.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows upon the stipulation and the evidence:

1. William H. Griffin, plaintiff, is and was at the times here involved a resident of the State of North Carolina.

2. On October 30, 1933, plaintiff was appointed Assistant Counsel in the National Recovery Administration, Washington, D. C., at a salary of $4,400 net ($5,180 gross) per annum, pursuant to the authority of the National Industrial Recovery Act, Title I, approved June 16, 1933, 48 Stat. 195.

3. Effective March 1, 1934, the status of William H. Griffin was changed to Grade 16, gross salary $6,000 per annum, and effective July 1, 1934, he was again appointed Assistant Counsel, Grade 16, at a salary of $6,000 per annum, less the 15 per cent deduction applicable to regular employees under the provisions of Sections 2 and 3 of Title II of the Act of March 20, 1933, as amended, for emergency work in the National Recovery Administration but not to extend beyond June 30, 1935.

4. Following the decision of the Supreme Court in the *Schechter case*, 295 U. S. 495, on May 27, 1935, the Congress, by Joint Resolution approved June 14, 1935, 49 Stat. 375, extended the duration of certain provisions of the Industrial Recovery Act and the agencies created thereunder,

but not beyond April 1, 1936. Pursuant to the authority of this Joint Resolution, the President on June 15, 1935, by Executive Order No. 7075, terminated the National Industrial Recovery Board, and to provide for the continued administration of the provisions of Title I of the National Industrial Recovery Act he created the office of Administrator of the National Recovery Administration; the Division of Review; and the Division of Business Cooperation.

The Administrator of the National Recovery Administration was directed to reduce as rapidly as possible the number of persons employed in the National Recovery Administration to the number necessary to perform the duties prescribed by this Executive Order; to facilitate the transfer of employees whose services might be desired by other agencies or departments of the Government, and to protect the continuity of the administration for its future usefulness in effectuating the policies and purposes of Title I of the National Industrial Recovery Act, as amended.

Shortly after the promulgation of Executive Order 7075, the then Acting Administrator received from the President a request that the positions of all employees of the National Recovery Administration be classified according to their changed responsibilities. In furtherance of this request, the Acting Director created a committee to reclassify the positions of all the remaining personnel of the National Recovery Administration. This committee consisted of three persons representing the National Recovery Administration and two other persons representing, respectively, the Budget Bureau and the Civil Service Commission.

The President, pursuant to the authority vested in him by the pertinent legislation, reduced the salaries of certain of the ranking officers of the National Recovery Administration by about 25 per cent, and it was suggested by a representative of the Budget Bureau that this reduction established a gauge or measure of the decreased responsibilities of the personnel to be retained. This procedure was discarded and the Acting Administrator determined that it would be more equitable and fairer to classify the personnel according to the standards fixed by the Reclassification Act of 1923 applicable to the regular departments and agencies of the Government.

Sometime in September or October 1935, the heads of the new divisions, created pursuant to Executive Order 7075, were called upon to outline the work they were to accomplish and to estimate the personnel required. At the same time the employees prepared and submitted job questionnaires descriptive of the work they were doing at that time. During this transitional period the employees of the National Recovery Administration, particularly the legal personnel, were doing work of a temporary character. At that time it was anticipated that the Congress might enact legislation to permit the accomplishment of certain of the policies and purposes of the National Recovery Administration. Many of the employees attached to the National Recovery Administration were discharged following the decision of the Supreme Court in the *Schechter case, supra.* The plaintiff herein was one of several attorneys retained as part of the nucleus of an organization prepared to begin immediate activities, should the Congress enact permissive legislation.

Confronted with this factual situation, the Classification Committee determined that the most effective method to follow would be to set up a theoretical organization and to block out and evaluate within that theoretical organization the several positions which the Committee estimated would be necessary to enable the said organization to perform the duties that it was anticipated might be assigned to it. When this was done, the Committee referred this theoretical plan to the heads of the various divisions. The heads of these divisions designated the personnel to be assigned to the positions created under this theoretical plan.

After the Classification Committee was created, plaintiff prepared several job questionnaires descriptive of the duties temporarily performed by him. These job questionnaires were not, however, considered by the Committee. The Committee ultimately determined that it was required to set up an abstract organization and evaluate positions therein, but not to classify individuals. The latter task was the responsibility of the heads of the divisions created under Executive Order No. 7075.

Shortly after June 15, 1935, plaintiff received the following notice:

Form 404–A

NATIONAL RECOVERY ADMINISTRATION

NOTICE OF CONTINUANCE OF APPOINTMENT*

JUNE 15, 1935.

CHAIRMAN REG. COUNSEL
GRIFFIN, WILLIAM H.

Pursuant to the authority vested in it by Executive Order No. 6859, dated September 27, 1934, authorized by Title I of the National Industrial Recovery Act as amended, the National Industrial Recovery Board hereby notifies you that effective June 16, 1935, your appointment is confirmed and continued until further notice but not beyond April 1, 1936.

By direction of the National Industrial Recovery Board:

[s] BRADISH J. CARROLL, Jr.,
Administrative Assistant and Chief Clerk.

*NOTE.—This notice is being issued to all employees to maintain continuity of employment pending decision as to which employees will be retained.

5. On November 20, 1935, plaintiff received the following notice:

Form No. 422

NATIONAL RECOVERY ADMINISTRATION

NOVEMBER 20, 1935.

WILLIAM H. GRIFFIN.
(Former Title).

A review of the classification of all present positions of the National Recovery Administration has been made in accordance with the provisions of Executive Order No. 6746, of June 21, 1934.

You are hereby notified that your position has been classified as follows: Title Sr. Attorney
Grade (E. O.) 14. Salary $4,500.

Your status as indicated above will become effective as of December 1, 1935.

For the Acting Administrator:

M. CREDITOR,
Control Officer.

You are assigned to the Review Division.

6. Thereafter plaintiff in person and by letter protested to the Committee on Classification and to the Acting Director of the Administration that the classification assigned to him was arbitrary, unfair, and not in accordance with the pertinent Executive Order; the rules and regulations of the Civil Service Commission; and the laws of the United States; that prior to and subsequent to the classification assigned to him on November 20, 1935, he had been assigned to duties, not reported to the Committee, of a character and importance justifying his classification in a grade carrying a salary of not less than $6,000.

7. On December 7, 1935, plaintiff, as one of the several attorneys employed by the National Recovery Act, whose services were loaned to the Federal Trade Commission, pursuant to the authority of Section 8 of the Federal Trade Commission Act, entered upon duty with the Federal Trade Commission and continued without interruption until April 1, 1936. The duties performed by plaintiff in the Federal Trade Commission had no relation to the duties theretofore performed by him in the National Recovery Administration. The loan of plaintiff's services to the Federal Trade Commission was made pursuant to the policy declared in paragraph 5 of the Executive Order 7075. During the period that he performed the duties for the Federal Trade Commission, plaintiff continued to protest to the Classification Committee of the National Recovery Administration that the classification assigned to him on November 20, 1935, was unfair and not descriptive of the duties being performed by him.

8. Effective January 1, 1936, the President, by Executive Order No. 7252, terminated the National Recovery Administration and the office of the Administrator thereof and transferred to the Department of Commerce the activities theretofore performed by "the Division of Review, the Division of Business Cooperation, and the Advisory Council." The executive Order provided that no person transferred pursuant thereto should acquire a Civil Service status.

9. On February 5, 1936, the Secretary of Commerce advised the Federal Trade Commission that a policy had

been adopted whereby all employees whose services had been loaned to agencies, which were affected by the failure of the passage of the Deficiency Bill, should be promptly transferred to the pay roll of those agencies as soon as the Deficiency Bill became law and the necessary funds were made available for that purpose; that the services of such loaned employees, who would not be retained by such agencies, would be promptly terminated by the National Recovery Administration; that in view of the necessity of liquidating the National Recovery Administration and due to the lack of funds to continue its present personnel until April 1, it was necessary to terminate the services of employees not performing work directly affecting the activities of the National Recovery Administration; and that in accordance with that policy the loan of employees to the Federal Trade Commission would be discontinued after February 15 and their services terminated.

Following the receipt of the letter of February 5, the Federal Trade Commission, in a memorandum dated February 6, 1936, directed that the data and recommendations concerning the classification and rate of salary affecting the personnel transferred to it by the National Recovery Administration should be filed for the time being without action, it being understood that the chairman would request the President to provide for the services of certain employees until April 1, 1936, at their present salaries, and that thereafter the Commission would give consideration to the question of their classification if and when consideration was given to the question of their employment by the Federal Trade Commission.

The Federal Trade Commission appointed plaintiff Senior Attorney, Grade P-5, at a salary of $4,600, effective April 1, 1936, and plaintiff received notice of this appointment on March 27, 1936.

10. From December 1, 1935, until March 31, 1936, both dates inclusive, plaintiff was paid for services rendered to defendant at the rate of $4,500 per annum from emergency funds allocated monthly by the Budget Bureau to the National Recovery Administration and the Department of

Commerce. Prior to April 1, 1936, plaintiff was not employed directly by, and received no compensation from, the Federal Trade Commission. During the period in question he continued to be an employee of the National Recovery Administration and the Department of Commerce. Pursuant to the provisions of the National Recovery Act, the appointment of plaintiff was exempt from the operation of the Civil Service laws and the Classification Act.

11. During the period from December 1, 1935, to March 31, 1936, salary checks payable to plaintiff were issued by the National Recovery Administration and the Department of Commerce semimonthly. On March 25, 1936, plaintiff received from the Chief of the Appointment Division, Department of Commerce, checks relating to compensation for services rendered the National Recovery Administration from December 1, 1935, to March 15, 1936, inclusive. A check covering compensation for services for the period between March 15, 1936, to March 31, 1936, inclusive, was received and accepted by plaintiff from the Department of Commerce at a later date. Plaintiff had, prior to the commencement of this suit, refused to receive and accept compensation for services rendered by him for the period from December 1, 1935, to March 15, 1936, inclusive, at the reduced rate of salary, namely, $4,500 per annum, for the reason that he did not wish to prejudice any right he might have to recover the difference between salary at the rate of $4,500 per annum and $6,000 per annum. On March 25, 1936, plaintiff signed an oath of office on Standard Form No. 8, approved by the President May 22, 1935.

On April 15, 1936, plaintiff addressed a letter to the Chief of the Appointment Division, Department of Commerce, protesting that the following typed matter, namely, "Senior Attorney, $4,500"; "December 1, 1935", was added to the oath of office subscribed by him on March 25, 1936, after he had signed the same, and without his knowledge or authority.

12. The difference between the salary which plaintiff received ($4,500 per anum) and the salary which he alleges he should have received ($6,000 per annum) for the period December 1, 1935, to March 31, 1936, inclusive, is the sum of $500.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

This action is brought to recover the difference in salary of $4,500 and $6,000 from December 1, 1935, to April 1, 1936.

The parties have stipulated the facts. The facts show that the plaintiff was employed by the National Recovery Administration in October 1933 as assistant counsel, at a salary of $4,400 (gross $5,180) per annum, and on March 1, 1934, his gross salary was increased to $6,000 per annum.

The National Recovery Administration was especially exempted from the Classification Act of 1923 and the Civil Service Laws. On May 27, 1935, the Supreme Court decided in the *Schechter case*, 295 U. S. 495, that certain sections of the National Industrial Recovery Act were unconstitutional. After this decision the President directed the Administrator of the National Recovery Administration to reduce the number of employees in the National Recovery Administration to that number necessary to perform the duties particularly prescribed. (Executive Order No. 7075.) The reduction of the force necessitated the discharge of many of the employees. Under this Executive Order the salaries of those employees retained were required to be reduced by 25% and the employees classified according to their changed responsibilities.

Plaintiff was notified of the reduction of his salary from $6,000 to $4,500, to commence on December 1, 1935. He protested in person and by letter. In December 1935, plaintiff was assigned as a loan employee to the Federal Trade Commission, and performed work in that capacity for the Commission until April 1, 1936. He was not on the roll of the Federal Trade Commission but remained as an employee of the National Recovery Administration and was paid from funds of that Administration to the first of January 1936. On that date the President, by Executive Order, terminated the National Recovery Administration as of April 1, 1936, and transferred its then activities to the Department of Commerce. From that time on, plaintiff was paid from funds of the Department of Commerce, allocated to it by

the Budget Bureau for the pay of services of employees of the National Recovery Administration. On February 5, 1936, the Federal Trade Commission was notified by the Secretary of Commerce that the National Recovery Administration would be liquidated as of April 1, 1936.

Plaintiff received pay at the rate of $4,500 per annum from December 1, 1935, to March 31, 1936, and on April 1, 1936, was transferred and placed on the Federal Trade Commission roll as an employee of that Commission.

The sole question in this case is the right of the Administrator of the National Recovery Administration to reduce plaintiff's salary on December 1, 1935, to $4,500 per annum. The position occupied by the plaintiff was administrative, not within the classified service, nor under the law of the Civil Service Commission. Both his salary and term of office were within the discretion of the Administrator. Neither his office nor his salary was fixed by statute.

In *Miller* v. *United States*, 86 C. Cls. 609, we held that where the salary of an office was specifically fixed by statute creating the position and an insufficient appropriation had been made by Congress to fulfill the statutory demand, recovery could be had for the difference between the amount appropriated and that which was called for in the statute.

In the case before us, the creation of the positions, the appointments to them, and the fixing of the salaries were solely within the discretion of the Administrator. The facts show that plaintiff was increased in salary and subsequently decreased.

An act of Congress having left it solely within the discretion of the Administrator to appoint, fix the term of office and the salary to which each appointee shall be entitled, and that discretion having been exercised, it is not reviewable by the court. We can find no regulation, law, or constitutional provision which entitles the plaintiff to recovery or which gives this court power to review the action of the Administrator in exercising his discretion in carrying out the orders of the Executive.

The petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

LARGURA CONSTRUCTION COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 43307. Decided April 3, 1939]

On the Proofs

Government contract; delay by Government.—Where it is shown by the evidence that the contractor had prosecuted the work with diligence so as to insure its completion within the time allowed by the contract and that the entire fault for the delay was due to the failure of the Government to comply with its part of the contract, it is held that cancellation of the contract by the Government was arbitrary and capricious, and the plaintiff is entitled to recover.

Same.—The Government can be required to make compensation to a contractor for damages which he has actually sustained by defendant's default in its performance of its undertaking to him.

Same.—While under the authorities plaintiff would have been entitled to whatever profit it could prove it would have made under the contract, it is held that in the instant case the proof does not show a profit would have been made.

The Reporter's statement of the case:

Mr. Norman B. Frost for the plaintiff. *Messrs. Frank H. Myers* and *Frederic N. Towers*, and *Dent, Weichelet & Hampton* were on the brief.

Mr. Henry Fischer, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. P. M. Cox* was on the briefs.

The court made special findings of fact as follows:

1. Largura Construction Company, plaintiff, is a corporation. It was organized under the laws of the State of Indiana, and has its headquarters at Gary, Indiana. It was organized for the purpose of carrying on a general contracting business.

2. Plaintiff filed with the Treasury Department a bid for the construction of a post-office building at Oak Park, Cook County, Illinois. Plaintiff was the low bidder and was awarded a contract to construct the building at the contract price of $349,500. Because of certain deductions made dur-

ing the progress of the work, the contract price was later reduced to $347,251.

On November 11, 1932, the contract was executed. The contract and accompanying specifications are of record as plaintiff's exhibit 1, and are by reference made a part of this finding. The plans and drawings of the building are of record as plaintiff's exhibit 34, and are by reference made a part of this finding.

With the contract plaintiff furnished a bond for performance, wherein three individuals were the sureties. This bond was approved and accepted by the defendant.

3. On December 19, 1932, plaintiff was instructed by the Supervising Architect, Treasury Department, to begin work. Under the provisions of the contract, plaintiff had until February 13, 1934, within which to complete the work, being 420 days from the date of the notice to proceed. The building was of the type known as a "wall bearing job," meaning that there were no exterior columns provided. The walls were to be of stone and were designed in a way to permit them to bear the weight of steel girders supporting the floors and roof. Because of such design, it became impossible to set in place the horizontal steel beams which were to support the floors and the roof, or to pour the concrete roof slab, until the stone work had been carried up to the height required for the taking of the bearing plates.

4. Under the contract, certain stones for the walls of the building were to be carved. The carved stones included large panels, about 10 feet long by 6 feet high, at the entrances on Lake Street and Kenilworth Avenue, depicting progress in Oak Park. Other stones for the walls of the building were described as architrave stone, pilaster caps, coping stones, large eagles over the entrance, and crest stone. Various lettering was called for on certain of the stones. The carved stones represented about 5 percent of all the stone going into the building. Thirty models for the carving to be so done, according to the contract, were to be furnished by the Government to the plaintiff and the stones were to be carved at the quarry. Each of these models had to be reproduced several times, in order to secure all carved

stone necessary for the building. Paragraph 310 of the specifications provided:

> Carving shall be done in a careful and artistic manner and shall reproduce the spirit and intent of the models and details furnished.

5. On December 19, 1932, plaintiff began its work of clearing the site, excavating, and arranging for the necessary labor and materials. In March 1933, the contractor learned, through the architects, that there would be delay on the part of the Government in furnishing models for the stone carving. On March 29, 1933, the architects advised defendant that unless the model contract was awarded immediately there would be extensive delay to the building. The Government engineer on the job had knowledge of this delay as early as April 1933, when he wrote the Treasury Department that the delay was disturbing the progress of the job. On several occasions between April 19, 1933, and February 1, 1934, plaintiff advised defendant that delay in furnishing these models was both holding up the job and causing extra expense to the contractor. On April 19, 1933, plaintiff notified defendant's engineer on the job that if the models were to be delayed, as plaintiff had been advised, and the carving was to be done at the building site after the stone had been set in place, plaintiff would require an extra. In the early part of June 1933, plaintiff had brought its construction work to a point where the carved stone was required for the walls.

6. In December 1932, plaintiff had prepared its progress schedule, showing when each class of work was to be started and completed for the building, and the sequence in which each item of work was to proceed. Plaintiff scheduled the building for completion in 358 days. The schedule was based on plaintiff's knowledge of the requirements of the building, together with the plaintiff's past experience on similar projects. Plaintiff, in submitting its bid, expected to do the work in an orderly manner, in the sequence set forth in the progress schedule; it did not calculate that it would be delayed by action of defendant in failing to fur-

nish models for stone carving; neither did it calculate that the work of roofing and enclosing the building, lathing, and plastering the interior finish would be postponed into the succeeding winter weather. A copy of the progress schedule was furnished to and approved by the defendant and is of record as plaintiff's exhibit 2, and by reference, made a part of this finding.

7. Beginning the early part of June 1, 1933, and lasting until the cancellation of its contract, hereinafter related, plaintiff, because of the failure of the Government promptly to supply models for stone carving, was delayed in its efforts to complete the work. This failure prevented an orderly progress and adherence to the schedule of progress that had been adopted by the plaintiff and furnished to and approved by the defendant.

During July 1933, defendant requested plaintiff to submit its estimate as to the amount plaintiff would deduct from the contract price in the event certain large sculpture panels occurring on the Lake Street elevation were eliminated, and plain stone used in lieu thereof. Plaintiff was advised by its stone subcontractor that it would deduct $1,000 for this item and on July 12, 1933, plaintiff informed the Government that, should these sculptured panels be eliminated, the Government might deduct $1,000 from the total. Correspondence between the office of the Acting Supervising Architect and plaintiff regarding this deduction occurred from July 12, 1933, to September 20, 1933, the Government insisting upon an allowance of $1,200, rather than the $1,000 offered by plaintiff. Finally plaintiff conceded an allowance of $1,200 because of its desire to prevent further delay. About October 18, 1933, the question of the elimination of these particular carvings was settled. During this period models for none of the carved stone in question were supplied, and, as a result, progress of the work was seriously interfered with. At the request of defendant, plaintiff endeavored to keep the job going by doing miscellaneous work which was out of sequence. In order to carry up as far as possible the ordinary stone walls, plaintiff placed steel lintels where carved stone should have been, and backed up the walls with common brick, even though the stone was not in place.

The failure of the carved stone to arrive necessitated hanging swinging scaffolds, in order to place the carved stone in the openings thus created.

In January 1934, plaintiff poured the high section of the roof slab, which work had been scheduled to begin on September 1, 1933. Since this work was being done in cold weather, plaintiff had to take precautions to keep the concrete from freezing. Sheet iron heaters were hung on wires and workmen were kept on the job day and night firing the heaters. This was done by plaintiff during the entire time the roof was being poured and cured. Certain plumbing work, brick work, and work on the driveways was done out of sequence in order to keep the job going. It was impossible to do the interior work, painting, glazing, interior marble, woodwork, and floors until the building was enclosed.

8. The first models were received at the quarry October 3, 1933, and the carved architrave stone first arrived on the job on October 31, 1933, and was promptly set. The next carved stone was received on the job near the last of April 1934. On January 23, 1934, the models for all the stones above the cornice were shipped by the modeler. The carved stone began arriving at the job late in April 1934; deliveries continued during the month of May 1934; and the last carload arrived about June 1, 1934. It was impossible for plaintiff to finish the roof or enclose the building until it received the stone carved from these models.

Plaintiff could have followed its progress schedule and completed the building within 420 days had defendant furnished the models for stone carving early enough to have permitted the carved stone to have been placed in position in the orderly sequence of the job.

9. On February 1, 1934, plaintiff, in writing, requested from defendant an eleven-month extension of time, because of the delays. Defendant's engineer on the job wrote the Treasury Department, with respect to the requested extension, stating that the facts were as set forth in plaintiff's letter of February 1, 1934, and recommended that the extension be granted. The recommendation of the Government engineer did not include any allowance for subsequent delays. Officials of plaintiff corporation visited Washington in person

and pressed the application for the extension. Subsequent to their visit to Washington, the Acting Supervising Architect wrote plaintiff as follows:

[TISA 3691]

TREASURY DEPARTMENT,
Oak Park, Ill., P. O., Feb. 14, 1934.

LARGURA CONSTRUCTION COMPANY,
Gary, Indiana.

GENTLEMEN: The receipt is acknowledged of your letter of Feb. 1, 1934, asking consideration of 11 months' delay in connection with your contract for the construction of the Post Office at Oak Park, Illinois, due to the nonreceipt of models.

A review of our records indicates that there was considerable delay resulting from conditions with regard to the models. The bids for the models were forwarded by the Architects on Feb. 3, 1933, but due to the change in administration and the promulgation of new policies with regard to government expenditures, it was not possible to award the model contract until May 29, 1933. It was not until July 19, that the bond on the model contract was approved for the reason that the modeler did not seem to thoroughly understand the requirements and failed to properly execute the documents, necessitating their return twice for correction. After he was given notice to proceed it appears that the first set of full sized details forwarding him were lost, as it was necessary to forward another set on August 16. In the meantime the architects had advised as early as March 29 that unless the model contract was awarded immediately there would be an extensive delay to the buildings as the large panels at the entrance required models and sculpturing work of a character which could not be completed in less than several months' time. The specification originally required the stone carving to be done at the fabricating shop and the architects brought up the question of having the stones shipped without carving, this work to be done later after they were in place.

The Engineer forwarded, on July 12, your proposal for the extra expense entailed in carving these panels after the stones were put in place. You were advised under date of Aug. 16 that your proposal was rejected as it was desired to omit the carving and have the rough stones installed in place. Your proposal for the omission of the carving was therefore requested. You wired

your bid of $1,000.00 as a deduction from your contract, but as this was inadequate you were requested on Sept. 12, for a figure approximating our estimate of $1,200.00, which was sent on Sept. 20, and accepted on Sept. 27. In the meantime, the question of omitting certain inscriptions had come up and your proposal of July 26 was accepted on Sept. 7, to omit cutting of the inscription in the stonework. It appears that this did not settle all points connected with the inscription, as there was some misunderstanding concerning the jointing of the stone after the inscription work was omitted. Some correspondence ensued before it was plain that this was the point upon which you wished advice. It was not until Dec. 9 that specific instruction was given the Engineer to confer with the Architects regarding the stone jointing.

It is also noted that the first models for the stone eagles did not meet the approval of this office. After the photographs were sent in the Architects were advised on Dec. 13, 1933, that a somewhat different treatment was desired in order to achieve an effect of dignity symbolic of their use as an insignia of the Federal Government. The necessary changes were made and the new photographs forwarded by the Architects on Jan. 5 were approved and shipment authorized on Jan. 15, 1934.

All of the delays cited above in connection with the models reacted against the pouring of the roof slab and the inside work, which had to wait until the building was enclosed. The Engineer verifies the fact that the building has been seriously delayed due to these causes, and while it is not felt that the compensating time due you amounts to as much as 11 months, it appears from our records and the reports from the job that you are entitled to a period of 270 additional days, due note of which will be made at the time of final settlement. This time approximates nine months covered by the period from the end of March 1933, when the Architects advised that the delay would reach a considerable extent, to Jan. 1934, when the models for the eagles were finally approved and the stone work could be completed.

Respectfully,

GEORGE O. VON NERTA,
Acting Supervising Architect.

The extension of 270 days, and a previous extension of 25 days, on account of weather conditions, made the total 295 days, which defendant allowed.

On February 20, 1934, defendant wired the plaintiff:

> Voucher withheld pending receipt of additional bond, Oak Park, Illinois.

This was followed February 23, 1934, by another wire from defendant to plaintiff as follows:

> In view of statements in letter signed by President, Gary Trust and Savings Bank, additional bond Oak Park will not be required at this time.

No additional bond was thereafter required.

10. Partial payments were provided for at the end of each calendar month as the work progressed, based on estimates approved by the contracting officer. The contract provided that the material delivered on the site, and the preparatory work done, might be taken into consideration in preparing the estimates; also, the contracting officer, if satisfactory progress was being made, might, at any time after 50 percent of the work had been completed, make the remaining payments in full without deduction of the 10 percent, as contemplated in the contract.

On March 8, 1934, plaintiff applied to the Supervising Architect, Treasury Department, in order to obtain such progress payments in full from and after October 31, 1933. On March 30, 1934, the Treasury Department replied as follows:

> LARGURA CONSTRUCTION CO., INC.,
> *3672 Adams Street, Gary, Indiana.*
>
> GENTLEMEN: In connection with your contract for construction of the Post Office at Oak Park, Illinois, reference is made to your letter of March 8, 1934, requesting that monthly payments in full be made on account of your contract, as the work has passed the 50% mark of completion.
>
> The progress report of October 31, 1933, shows the work 51.2% complete. It is noted that you have been delayed by conditions beyond your control, and since that date you have been granted additional time of 295 days, which brings the progress report of February 28, 1934, to 60.5 complete, with normal as 57% and the work progressing satisfactorily.
>
> Therefore, in accordance with Article Sixteen of your contract, the Department hereby consents to the modi-

fication of your contract to permit of progress payments in full for work satisfactorily installed after October 31, 1933, provided the work continues to progress to the satisfaction of the Department.

A copy of this letter will be forwarded to the engineer as his instructions in issuing vouchers for the work.

Respectfully,

DIRECTOR OF PROCUREMENT.

11. On March 30, 1934, the contract was 60.5 percent complete, with normal 57 percent; and the work at that time was progressing satisfactorily. The arrangement indicated by the letter of March 30, 1934 (finding 10), was never consummated by payment of prior retainage or by payment in full for the succeeding calendar month's work. At the end of each month the practice of the Government engineer was to make up a voucher covering the work done in the preceding month; plaintiff would then sign the voucher, and a draft, less the 10 percent retainage, would issue to plaintiff. During May 1934, plaintiff set seven carloads of stone; placed in position substantially all the steel window frames except a few awaiting work by the plumber; all of the brick work inside of the wainscot was laid; part of the tunnel work was done; excavation was made for the sewer; finished hardware was installed on the windows and other miscellaneous work was done. The total value of work done during May was at least $6,905. The Government engineer in charge made up the voucher for the month of May at $600 and refused to certify a greater sum. His reasons for refusing to certify a greater amount was because plaintiff had not paid the manufacturer for the steel windows and because there was a discoloration of the stone that had been set. The stone so set in the building in May 1934 was natural stone, articially colored a buff shade by staining. The architect had previously criticized the stone as being too light in color and not stained a uniform color. The stone subcontractor sent men on the job to correct this condition but, due to the cancellation of the contract by defendant, they were not permitted to do the work. The cost of correcting the color condition of this stone would not have exceeded $100.

Reporter's Statement of the Case

12. On May 22, 1934, the Government engineer in charge asked each of plaintiff's subcontractors, by letter, whether plaintiff owed them any money; and if so, how much; and whether they were delayed in the furnishing of their materials because of any moneys due them. As a result of the receipt of these letters, several subcontractors concluded there was something wrong with the job. At about the time the letters were so written, a newspaper published at Oak Park, Illinois, published certain correspondence between a member of the United States Congress and the Treasury Department, in which the delay in the completion of the building was attributed to plaintiff. Dissatisfaction among plaintiff's subcontractors and a marked disorganization on the job resulted. This result was caused in part by the letters to plaintiff's subcontractors, the failure of defendant to pay the retainage from October 30, 1933, the newspaper publicity and defendant's failure to compensate plaintiff for work done in May 1934.

13. Models for carved stone, other than those for architrave stone, were approved on January 15, 1934, and were shipped to the quarry by the modeler on January 24, 1934. The stone quarry was located at Bloomington, Indiana, which was 200 miles from the building site. It took considerable time, after receipt of the models at the quarry, for the carving and shipping of the stone to the job site. Seven carloads of stone were received at the job site during April and May. The first carload, containing the carved eagles, was shipped on April 14, 1934, and received at the job about May 1, 1934. Six other shipments from the quarry of the carloads were made from April 20 to May 24, 1934. The last carload was received on the job June 1, 1934. All of the stone was set by plaintiff promptly upon its receipt. When the last of the carved stone was set in place, the building was 65% completed and the work which plaintiff had planned to do with his own organization was entirely completed, except for correcting the stain on the stone, and some small odd jobs. Plaintiff, at the beginning of the job, had arranged with its subcontractors for doing the remaining work. Due to delay in furnishing models and the consequent delay in completing the walls

and roof, and the fact that in July 1933, codes of the National Recovery Administration had become effective, certain of the subcontractors were not willing to proceed unless they were granted substantial increases over the amounts of their original bids. One of the subcontractors had gone into bankruptcy.

14. Plaintiff's financial condition was good at the beginning of this job. During the early part of 1934 plaintiff had been slow in paying some bills of certain subcontractors for working material because of the long delay on the job. Plaintiff's vice president called a meeting of the subcontractors for the purpose of reorganizing them and arranging to complete the building. A committee of subcontractors was formed. All of the subcontractors expressed their willingness to go ahead with the work if plaintiff would make arrangements to have future progress payments escrowed for their benefit. Plaintiff was willing to do this. Two days prior to a meeting of the committee of subcontractors, on June 7, 1934, plaintiff received the following telegram cancelling its contract:

> Notice is hereby given your right to proceed under your contract construction Oak Park Illinois Post Office terminated this date due to unsatisfactory progress. Letter follows. Please acknowledge.

15. The Government took over all of plaintiff's property on the job site, including tools and appliances, plaintiff's papers, bookkeeping records, and other property, none of which it has returned.

The original date set for completion of the contract was February 12, 1934, being 420 days for performance. By order the time had been extended 295 days, on circumstances existing on or before February 1, 1934, thereby setting December 4, 1934, as the new date for completion.

Delay in the completion of the work, due to the Government's failure to furnish the models for stone in a reasonable time, was a continuous one and extended beyond February 1, 1934, for which subsequent period no extension of time for performance was considered by the contracting officer or his representative.

Had the contract not been canceled plaintiff would have finished the work within the time as formally extended, viz, on or before December 4, 1934.

On June 7, 1934, the plaintiff had been fully employed on the job an aggregate of approximately 210 calendar days only, due to the Government's delay, being one-half of the original 420 days allowed for completion, and during that time had accomplished 65 per cent of the work.

Cancellation of the contract by the defendant was arbitrary, capricious, and without justification.

16. The contract was canceled on June 7, 1934. At that time defendant owed plaintiff $21,805.80, retained under Article 16 of the contract. Also, there was due plaintiff for work performed during the month of May 1934, and up to the time of the telegram of cancellation, the sum of $6,905. At the time of the cancellation, the Government took over tools and equipment belonging to plaintiff, of a reasonable value of $1,000, none of which was returned.

17. Because of the delay, due to defendant's failure to sooner furnish the models for the carved stone, the plaintiff incurred additional expenses, in the total sum of $27,089.00, as follows:

Cost of maintaining plaintiff's organization on the job	$12, 968. 00
Office overhead at Gary offices	6, 719. 00
Additional cost, rental of equipment	6, 502. 00
Cost of additional heating	400. 00
Cost of closing in the building during existing cold weather	500. 00
Total	27, 089. 00

18. On June 7, 1934, plaintiff had performed work of the value of $218,058; plaintiff had been paid therefor the sum of $195,651.90; defendant had retained, under Article 16 (B) of the contract, the sum of $21,805.80; and the reasonable value of the work not completed by plaintiff was $129,193.00.

The amount of prospective profit, lost to the plaintiff by reason of the cancellation, is not adequately proved.

Defendant, after cancelling plaintiff's contract, solicited bids for the completion of the work. On November 22, 1934, after reducing the cost thereof by approximately

$41,000, defendant contracted with Holton-Seelye and Company to do the work for $146,179.00. Later, Congress granted an additional appropriation, following which defendant contracted with Holton-Seelye and Company to complete the work, together with additions and change orders not included in its original contract with plaintiff. Such changes produced a completed building in substantial compliance with the structure originally contracted for between plaintiff and defendant.

On July 29, 1937, defendant filed its counterclaim, in which it asked judgment against plaintiff in the sum of $37,825.39, with interest. Item V of the stipulation filed on September 15, 1937, itemizes defendant's counterclaim which, as computed by defendant, shows a balance due defendant of $36,619.89. The stipulation is, by reference, made a part of this finding.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

The plaintiff on November 11, 1932, entered into a contract with the defendant by which the plaintiff agreed to furnish all labor and materials and to perform all work to be required for the construction of a United States Post Office Building at Oak Park, Cook County, Illinois, for the sum of $349,500.00, according to the specifications, schedules, and drawings, which were made a part of the contract. This sum was reduced by certain changes to $347,251.00. Plaintiff furnished a performance bond with three individuals as sureties. This bond was approved and accepted by the defendant.

The building was to be completed within 420 days after the receipt of notice to proceed. On December 19, 1932, the plaintiff was instructed to begin work which fixed the final completion date as of February 13, 1934. The defendant furnished the site and was also to furnish 30 models for the carving to be done on the stones which were to be carved at the quarry. Each model had to be reproduced several times in order to secure all the carved stone for the building, and the carving was to be done in a careful and artistic manner

so as to reproduce the spirit and intent of the models. There were no exterior columns provided because the building was to be of a type known as "wall bearing." The walls were to be of stone and designed in such a way as to permit them to bear the weight of steel girders supporting the floors and the roof. With this design it was impossible to set in place the original steel beams, which supported the floors and the roof, or to pour the concrete slabs until the stone work had been carried up to the height required for the bearing plates.

At the commencement of the work, the plaintiff prepared a schedule of its contemplated progress of each class of work and furnished a copy to the defendant and to its subcontractors. This schedule of progress was an essential part of the contract arrangement, expected cost, and amount of its bid. According to this progress schedule, the plaintiff would have been prepared to carve the stone in the early spring. In March, the contractor learned that there would be a delay on the part of the Government in furnishing models for the stone carving. The defendant was advised on the 29th of March 1933, that unless the model contract was awarded immediately there would be extensive delays to the building. The following month defendant's engineer on the work notified the Treasury Department that the delay in furnishing the models was disturbing the progress of the work. On repeated occasions the defendant was notified that its failure to comply with the terms of the contract to furnish these models for the stone carving was occasioning extensive delays.

In June 1933, the construction work was brought to the point where the carved stone was necessary for the walls. The first models were not received until October 3, 1933, and on October 31, 1933, the carved architrave stone was received and promptly set. It was not until the following April 1934, that the necessary carved stone was received. On January 23, 1934, the models for all the stone above the cornice were shipped by the modelers. The last carload of stone did not arrive until June 1, 1934. During this period of delay, the plaintiff endeavored to minimize the loss by doing miscellaneous work out of sequence and contrary to its

progress schedule. The roof slab, which was scheduled to have been poured during the month of September 1933, was not poured until January 1934. This necessitated work during the cold weather and plaintiff was put to an additional cost in supplying heat both night and day. However, it was impossible to perform the interior work, such as painting, glazing, interior marble, woodwork, and the laying of floors until the building was enclosed.

In February 1934, plaintiff requested an extension of 11 months, due to the failure of the Government to perform its part of the contract in furnishing the models for the carving of the stone. The defendant, in writing, admitted a delay of 9 months and extended the completion date for 270 days. A previous extension had been granted of 25 days, due to bad weather. Therefore, the final completion date was extended to December 4, 1934.

Partial payments were provided for at the end of each calendar month as the work progressed, based on the estimates approved by the contracting officer. The contract provided that, if the contracting officer found that satisfactory progress was being made at any time after 50% of the work had been completed, the contractor should receive full payments without the deduction of the retained percentage. On March 30, 1934, the defendant admitted that over one-half of the work was completed; that plaintiff had been delayed by conditions beyond its control; that an extension of time of 295 days had been granted and at which time over 60% of the work had been completed and the work was "progressing satisfactorily."

Although plaintiff had performed approximately $7,000 worth of work during the month of May, the Government engineer in charge refused to certify more than $600, basing his refusal on rumors and information, which he had personally solicited, that plaintiff owed certain amounts to his subcontractors and materialmen. On June 7, 1934, the defendant notified plaintiff by telegram that the contract was terminated on that day "due to unsatisfactory progress."

The defendant took over plaintiff's property on the site, including tools and appliances, none of which has been

returned. Upon the date of cancellation by the defendant, the building was 65% completed and plaintiff had consumed only 210 full-time calendar days of the original 420 days and over one-half of the work had been completed. At the time of cancellation the defendant had the percentage retained from each payment amounting to $21,805.80.

After the cancellation of the contract with the plaintiff, defendant entered into a contract with another party and the building was subsequently completed.

From the facts above cited, it is clearly apparent that the action of the Government in canceling the contract was arbitrary and capricious. Article 9 of the contract provides:

> If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. * * *

It will be seen from this provision of the contract that there is no justification for the cancellation of the contract where it is shown that the contractor is prosecuting the work with diligence so as to insure its completion within the time allowed by the contract; plaintiff had performed over 60% of the work in 210 full-time calendar days, or one-half of the original time allowed in the contract; and when approximately 200 days remained of the extended time in which to complete the balance, or less than 40% of the construction work.

The entire fault for the delay was due to the failure of the defendant to comply with its part of the contract. The unreasonable and unwarranted failure to furnish the models for the carved stone was solely responsible for the building not being completed within the time limitations of the contract. The record shows that plaintiff's contract was arbitrarily terminated in order to protect the Supervising Architect's Office from censure from a political branch of

the Government, and to have the blame for the delay shifted from the shoulders of the Government to those of the contractor. The evidence clearly shows that, had defendant complied with its part of the contract, the building would have been completed on time. Whatever censure there may be, it cannot be imputed to the contractor.

It is too well established to require citation of authority that the Government can be required to make compensation to a contractor for damages which he has actually sustained by defendant's default in its performance of its undertaking to him. *United States* v. *Smith*, 94 U. S. 214.

The cancellation of this contract being arbitrary and capricious, plaintiff is entitled to recover the damages sustained and proved as follows:

Maintenance of organization and sustained losses due to period of delay	$12, 968. 00
Overhead at office	6, 719. 00
Cost of furnishing heat during cold weather	400. 00
Enclosing building during cold weather	500. 00
Retained percentage on payments made to plaintiff	21, 805. 80
Work performed and materials used in construction in May	6, 905. 00
Value of tools and equipment, which had been taken over at time of cancelation of the contract	1, 000. 00
Total	56, 799. 80

Plaintiff claims that the work would have been completed on time and that a profit would have been made. Under the authorities plaintiff would have been entitled to whatever profit it could prove it would have made under the contract, but we do not think that the proof in this case shows that a profit would have been made. Therefore, this item is not allowable because of failure of proof.

We have not discussed the defenses made by the defendant as we feel that they do not merit serious consideration.

Plaintiff is entitled to recover the sum of $56,799.80. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

MOHAWK MINING COMPANY v. THE UNITED STATES

[No. 43309. Decided April 3, 1939]

On the Proofs

Income tax; amendment of timely claim for refund.—Where on November 1, 1932, taxpayer filed claim for refund, in connection with tax paid for 1929, which claim was specific in character, relating to whether certain interest was tax exempt, and a second claim, seeking refund on other and additional grounds, was filed more than two years after the payment of the 1929 tax, it is held that the second claim cannot be considered an amendment under the rule laid down in the case of *Mabel S. Andrews* v. *The United States*, 302 U. S. 517.

Same; statute of limitations.—A claim which is specific in character cannot be amended, after the statute of limitations has run, to allow recovery on grounds not advanced in the original claim.

Same; returns to be annual and complete.—All the revenue acts since the adoption of the Sixteenth Amendment have provided for the return of income on an annual basis, and the return for each year is required to be complete in and of itself.

Same; limitations upon claims.—The same rule applies to limitations applicable to the annual return with respect to the making of additional assessments or the refund of overpayments.

Same.—The fact that adjustments asked for might affect income in subsequent years would not permit a refund for any year other than the year named in the claim for refund.

The Reporter's statement of the case:

Mr. George E. H. Goodner, for the plaintiff.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a Michigan corporation with its principal office at 15 William Street, New York City. Its business is that of mining and selling copper.

2. Plaintiff duly filed a corporation income tax return for the calendar year 1929 disclosing a net income of $917,-839.60 and a tax liability of $100,962.36. The tax was paid in four equal installments of $25,240.59 on March 15, June 14, September 15, and December 15, 1930.

Reporter's Statement of the Case

3. In May 1931 the Commissioner of Internal Revenue assessed an additional tax for the year 1929 of $11.00 and interest of $.78, which tax and interest were paid by plaintiff June 15, 1931. That additional tax and interest were assessed pursuant to a waiver executed by plaintiff of its right to file a petition with the United States Board of Tax Appeals.

4. November 1, 1932, plaintiff filed a claim for refund of $101.53 for the year 1929 and assigned the following basis therefor:

> This company prepared the corporation income tax return for the year 1929 on the accrual basis.
>
> Included in the net amount, as reported, were two items of interest in the total amount of $1,088.74 received with refunds of taxes, as follows:

Year	Certificate of over-assessment	Schedule Number	Refund	Interest
1919	2076616	33539	$6,100.01	$915.00
1920	2076613	33539	1,158.29	173.74
Total				$1,088.74

> The interest is tax exempt, being an obligation of the Federal Government, or, if taxable at all, it should be accrued over the period for which it was allowed, and not all reported in the year 1929, in which it was received, in accordance with G. C. M. 10384, XI–15–5442, and the courts' decisions in the cases of *Comm.* v. *Midland Valley R. R. Co.*, U. S. Cir. Ct. of App. for 10 Cir., No. 497, 4/11/32, and *Miller & Vidor Lumber Co.* v. *Comm.*, Cir. Ct. of App., 5 Ct. (39 Fed. (2d) 890).

5. On the same day that the claim for refund for 1929 (referred to in finding 4) was filed, namely, November 1, 1932, plaintiff filed a claim for refund of $23,000 for 1928 and assigned as one ground therefor a basis similar to that set out in the claim for refund for 1929 as to when certain interest accrued for taxation purposes, and in addition the following ground:

> On Aug. 16, 1923, Mohawk Mining Company acquired all of property and assets previously owned by the Wolverine Copper Mining Company. Refund of taxes should be allowed based on adjustments in opening and

closing inventories, as well as adjustments in the allowances made for depletion, depreciation, and obsolescence. Reconsideration should be given to the value of the properties owned by the Wolverine Copper Mining Company, and acquired in 1923 by the Mohawk Mining Co., for depletion purposes, as well as for depreciation and obsolescence.

6. December 12, 1932, the Commissioner wrote plaintiff as follows:

> Receipt is acknowledged of your letters dated December 6, 1932, protesting the proposed rejection of your claim for refund of 1928 income tax, as outlined in office letter dated October 25, 1932, and requesting that a hearing in Washington be held in abeyance pending reconsideration.
>
> You are informed that another claim for refund relative to depletion has been received, and is now under consideration.
>
> Accordingly, a conference will not be arranged until thorough consideration has been given to both issues involved.

7. January 5, 1933, the Commissioner advised plaintiff that its claims for refund of $196.65 and $23,000 for 1928, and the claim for refund of $101.53 for 1929 had been examined and that it was proposed to disallow all of the claims, giving reasons therefor, but that in the event plaintiff did not acquiesce in such proposed action, an opportunity for a hearing would be granted if requested within thirty days.

8. January 31, 1933, plaintiff requested a conference in regard to the claims referred to in finding 7 but requested that it be scheduled sometime in the month of March 1933, in order to enable it to assemble certain data for use at the conference.

February 7, 1933, the Commissioner replied to plaintiff's letter of January 31, 1933, and advised plaintiff in part as follows:

> Since this office desires to give full and careful consideration to all information which will affect your income tax liability, and as it is deemed inadvisable to arrange a conference prior to the receipt of the detailed protest, you are granted until March 1, 1933, to submit additional data.

The letter stated further that the request for a conference would be considered at a later date.

Thereafter the time for submitting the additional data was extended to March 11, 1933.

9. March 11, 1933, plaintiff filed a claim for refund of $25,251.29, income tax paid for 1929, and assigned the following basis therefor:

> On November 1, 1932, taxpayer filed a claim for refund with the Collector for the 2nd District of New York demanding refund of income tax paid for 1929. Said claim is now under consideration by the Commissioner at Washington, D. C. (See Bureau of Internal Revenue letter dated February 7, 1933, symbols IT: AR: A-3-AM. The time for filing additional data mentioned in said letter was subsequently extended orally to March 11, 1933.) This claim is now filed as supplemental and amendatory of said claim filed November 1, 1932.
>
> Taxpayer filed a timely income tax return for 1929 with the Collector for the 2nd District of New York, which return disclosed a net income of $917,839.60 and a tax liability of $100,962.36. Said tax was paid in quarterly installments on March 12, June 13, September 13, and December 13, 1930. The claim filed November 1, 1932, was therefore within two years of the last payment and is a valid claim to that extent ($25,240.59) as originally filed and as herein amended and supplemented. *U. S.* v. *Memphis Cotton Oil*, Sup. Ct. 1/9/33; *U. S.* v. *Factors & Finance Company*, Sup. Ct. 1/9/33.
>
> In auditing the aforesaid return, the Commissioner of Internal Revenue disallowed a deduction of $100.00 taken therein for a donation by taxpayer to Good Will Farm, Houghton, Michigan, and assessed an additional tax thereon of $11.00, which tax was paid by taxpayer some time in 1932. This claim is filed within two years of such payment.
>
> In addition to the contention that 1929 income should be reduced by the amount of $1,088.74 representing interest on tax refunds received in 1929 and included in said income, as more fully set out in the aforesaid refund claim filed November 1, 1932, taxpayer claims that income was overstated by the amount of $105,447.13 because of its failure to take an adequate deduction for depreciation and obsolescence of its Mohawk and Wolverine plants which were then known to be approaching the end of their useful existence.

Schedule 1 attached hereto sets forth the manner of computing the additional deduction herein claimed. The pounds of copper in the mine, the pounds removed, and the cost of the plant and equipment are not in dispute. It would therefore seem that this computation should be acceptable. It is an undeniable fact that the plant and equipment will have no value except for scrap when the copper is exhausted.

Schedule 2 shows the correct income and tax liability on the basis of the contentions herein made.

(Then follows a detailed computation of the additional deduction claimed for depreciation and obsolescence and also a recomputation of its income tax liability for 1929 showing an alleged overpayment for that year of $11,729.95.)

10. March 18, 1933, the Commissioner advised plaintiff's counsel that in compliance with his verbal request a conference had been arranged for April 14, 1933, in connection with plaintiff's claims for 1928 and 1929.

The conference was held April 14, 1933, at which time the subject matter of plaintiff's claims for refund for 1928 and 1929 heretofore referred to was discussed, including the claim filed for 1929 on March 11, 1933, as well as plaintiff's income tax return for 1930, involving the same issues as to inventories, depletion, depreciation, and obsolescence. At that conference it was agreed between representatives of plaintiff and the Commissioner that the basis for the depletion deduction should be the pounds of copper sold and the basis for depreciation and obsolescence deductions the pounds of copper produced each year. As a result of that conference plaintiff's counsel was requested to furnish the Bureau a statement as to the number of pounds of copper produced by years. The Commissioner had previously obtained the information as to the pounds of copper sold each year. April 15, 1933, in accordance with the foregoing request, plaintiff's counsel transmitted a statement showing the pounds of copper produced from March 1, 1913, to December 31, 1930.

11. July 25, 1933, plaintiff's counsel wrote the Commissioner, referring to the conference of April 14, 1933, and the additional information furnished in the letter of April

15, 1933, and stated that it was his understanding at the conclusion of the conference that plaintiff's refund claims would be allowed to the extent agreed upon in the conference, but that since that time a revenue agent had requested certain additional information from plaintiff, from which plaintiff's counsel understood that certain readjustments of plaintiff's inventories would be required. Plaintiff's counsel further stated that in preparing the revised statement of the inventories an error had been discovered in the information previously furnished the Commissioner of copper produced for 1930 and accordingly transmitted revised inventories for 1928, 1929, and 1930, as well as changes in income and a recomputation of plaintiff's income tax liability for those years.

12. November 23, 1933, the Commissioner advised plaintiff of his proposed action on its two claims for refund for 1928, its claims for refund of $101.53 and $25,251.59 for 1929 and a claim for refund for 1930. One of the claims for refund for 1928 and the claim for refund of $101.53 for 1929 were based on certain contentions with respect to interest, and the Commissioner stated that it was proposed to disallow both of these claims. The other claims for 1928 and 1929 and the claim for 1930, had at least as the major ground certain contentions with respect to depletion, depreciation, and obsolescence and inventory adjustments. One paragraph of that letter read as follows:

> As the result of the conference held in this office on April 14, 1933, adjustments have been made for depreciation and obsolescence based on reserve as at December 31, 1927, of 64,100,000 pounds of copper. The allowance is calculated on the pounds of copper actually taken out of the mines instead of on the pounds of copper sold as claimed on your income tax returns. The inventories have been adjusted to give effect to the revised depreciation and obsolescence.

The proposed action on the three last-named claims was as follows:

> Your claim for the refund of $23,000.00 for 1928 will be disallowed for the reason that the adjustments as shown in the attached statement result in a deficiency in income tax for 1928.

> Your claim for the refund of $25,251.59 for 1929 filed March 11, 1933, will be disallowed except for an amount of $11.78, for the reason that the claim was not filed within two years from the time the remainder of the amount of the income tax was paid. Reference: Section 322, Revenue Act of 1928. The Bureau holds that this claim is not an amendment to claim for $101.53 filed on November 1, 1932. See Treasury Decision #4265, Cumulative Bulletin VIII-1, page 110.
>
> Your claim for the refund of $34,405.06 for 1930 will be partially disallowed, based on the adjustments shown in the attached statement.

The letter extended to plaintiff the opportunity for a further hearing on the claims and to file additional information, provided request was made within fifteen days. Attached to the letter was a computation of depreciation and obsolescence for 1928, 1929, and 1930, a readjustment of inventories for those years, and a recomputation of income and tax liability for the same years. The revised tax liability showed a deficiency of $1,144.21 for 1928 but barred by the statute of limitations, an overassessment of $3,451.28 for 1929, $11.78 of which was shown as allowable and the balance barred by the statute of limitations, and an overassessment of $2,912.18 for 1930.

13. December 6, 1933, plaintiff's counsel asked for extension of time until January 20, 1934, in which to prepare and submit additional information and that request was granted by the Commissioner in a letter dated December 12, 1933.

January 23, 1934, plaintiff's counsel asked for a conference during the last week in March 1934, on plaintiff's claims for 1928, 1929, and 1930, stating that all the information regarding the issue in the claims was already before the Bureau.

14. Pursuant to the request of January 23, 1934, a conference was held on March 16, 1934, between plaintiff's representative and representatives of the Commissioner. At that time the issues involved in the tax liability for the years 1928, 1929, 1930, and 1931, were considered and an agreement was reached as to the manner in which depreciation and obsolescence should be considered in computing

the cost of inventories and the proper rate of depreciation. Plaintiff's representative was requested to furnish a computation of the 1931 inventory of copper on hand and the number of pounds of copper produced and sold in 1931.

As a result of that conference plaintiff's counsel on May 21, 1934, furnished a recomputation of its inventories for the years 1928, 1929, 1930, and 1931, giving effect to depreciation and obsolescence, and also set out a revised computation of its tax liability. Such recomputation showed an overpayment for 1928 of $2,913.82, an overpayment for 1929 of $9,597.32, an overpayment for 1930 of $6,643.72, and a loss for 1931.

May 25, 1934, plaintiff submitted further information regarding plaintiff's depreciable property accounts and its method of calculating annual depreciation charges, and on May 29, 1934, submitted additional information in regard to the same matter.

15. June 28, 1934, the Commissioner advised plaintiff of his action on the claims heretofore referred to for 1928, 1929, and 1930, such letter reading in part as follows:

> Adjustments have been made for depreciation and obsolescence based on reserve as at December 31, 1927, of 64,100,000 pounds of copper. The allowance is calculated on the pounds of copper actually taken out of the mines, instead of on the pounds of copper sold, as claimed on your income-tax return. The inventories have been adjusted in accordance with the computations submitted by your representative, Mr. George E. H. Goodner, in brief dated May 21, 1934, the obsolescence of plant and equipment included with depreciation in cost of mining in office letter dated November 23, 1933, has been eliminated therefrom, resulting in the revised inventories.
>
> Your claim for the refund of $25,251.59 for 1929, filed March 11, 1933, will be disallowed except for an amount of $11.78, for the reason that the claim was not filed within two years from the time the remainder of the income tax was paid. See Section 322 of the Revenue Act of 1928. The Bureau holds that this claim is not an amendment to claim for $101.53 filed on November 1, 1932. See Treasury Decision 4265, Cumulative Bulletin VIII-1, page 110.
>
> Your claims for 1928 and 1930 will be allowed in part as shown in the attached statement. Official notice of

the partial disallowance of your claims will be issued by registered mail in accordance with section 1103 (a) of the Revenue Act of 1932.

Attached to letter was a statement showing a computation for depreciation and obsolescence for 1928, 1929, and 1930, inventories for those years, and adjusted income and tax liability for the same years. The statement showed an overassessment for 1928 of $2,589.06, an overassessment for 1929 of $10,026.32, of which $10,014.54 was shown as barred by the statute of limitations and $11.78 allowable, and an overassessment for 1930 of $6,643.72. With respect to the overassessment for 1929 the letter stated:

> The overassessment determined is due to additional allowances for depreciation and obsolescence and adjustment of closing inventory. The first item is covered by claim for refund filed March 11, 1933, which date was within two years from June 15, 1931, the date of payment of $11.78 additional tax and interest assessed. This claim was not filed within two years from date of payment of original assessment, hence the allowable overassessment may not exceed the sum of $11.78.

16. July 30, 1934, the Commissioner issued to plaintiff a certificate of overassessment which stated that an audit of its income-tax return and all claims filed for 1929 showed an overassessment determined as follows:

Income tax assessed:		
Original, account #402852		$100,962.36
Additional, May 23, 1931, page 2, line 4, #4		11.00
Interest, May 23, 1931, page 2, line 4, #4		.78
Total		$100,974.14
Correct income tax liability	$90,947.82	
Correct interest liability	None	
		90,947.82
Overassessment of tax and interest		$10,026.32
Barred by statute of limitations		10,014.54
Overassessment allowable		$11.78

The certificate of overassessment showed the amount allowed as $11.78 and gave the following explanation of the Commissioner's action:

> The adjustments producing this overassessment are contained in schedules attached to a separate communication addressed to you.

In the determination of this overassessment the grounds set forth in your claims for the refund of $101.53 and $25,251.59 have been given careful consideration, and to the extent disallowed official notice will be issued by registered mail in accordance with section 1103 (a) of the Revenue Act of 1932.

The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 322 of the Revenue Act of 1928.

17. August 16, 1934, plaintiff received a check for $13.99 representing the overpayment set out in the foregoing certificate of overassessment and interest as determined by the Commissioner for 1929.

18. August 23, 1934, the Commissioner advised plaintiff by registered mail that its two claims for refund for 1928 and the two claims for 1929 had been disallowed to the extent not allowed as heretofore shown.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

In this suit for the recovery of income tax, plaintiff's contention is that it filed a timely claim for refund under which it may recover an overpayment determined by the Commissioner for 1929, which the Commissioner has refused to allow on the ground that the claim was not filed within two years from the time the tax was paid as provided in section 322 of the Revenue Act of 1928. (45 Stat. 791.)

An examination of the facts, which we have set out in some detail in order to show what occurred, leaves no doubt that plaintiff's contention is without merit. The only claim for 1929 which was filed within two years of the payment of the tax (except as to a small additional tax which is not in dispute) was a claim filed November 1, 1932, and it was specific in character, relating to whether certain interest was tax exempt. That claim was rejected and is not involved in this suit. Since it was specific in character it could not be amended after the statute had run to allow recovery on grounds not advanced in the original claim. *Mabel S. Andrews* v. *United States*, 302 U. S. 517.

The second claim for 1929 which was filed more than two years after the payment of the tax sought to be recovered and which was referred to as amendatory of the claim filed November 1, 1932, sought recovery on new and additional grounds, namely, adjustments of inventories, depletion, depreciation and obsolescence. The overpayment determined by the Commissioner, which he refused to refund to plaintiff, was on account of adjustments under the additional grounds just stated. Obviously, adjustments of that character are so far removed from the basis of the first claim, tax-exempt interest, as to leave no doubt that the second claim undertook to set up a new cause of action which was not within the first claim and therefore could not be considered an amendment under the rule laid down in the *Andrews case, supra.*

Plaintiff makes the further contention that the second claim filed for 1929 amounted to the "perfecting" of an informal claim timely filed for that year and therefore recovery should be allowed. The informal claim referred to was a claim filed for 1928 and made no reference to 1929, the year with which we are concerned. All the revenue acts since the adoption of the Sixteenth Amendment have provided for the return of income on an annual basis, and the return for each year is required to be complete in and of itself. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359. The events occurring in one year may be connected with or affect transactions occurring in another year but that does not alter the fact that the return must be complete for the year for which made. Clearly the same rule would apply to limitations applicable to that return with respect to the making of additional assessments or the refund of overpayments. The fact, therefore, that the adjustments asked for in the claim for 1928 might affect income in subsequent years would not permit a refund for any year other than the year named in the claim for refund. How far reaching the upholding of plaintiff's contention would be is well illustrated by the character of adjustments requested and allowed under the 1928 claim, namely, inventories, depletion, and depreciation. The bases fixed for these adjustments for 1928 not only affected income for 1929 and 1930

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but also might well have a similar effect on income for other subject years, and certainly claims for refund would be required before recovery could be had in those years.

Nor is the situation changed because the Commissioner, in making the adjustments sought under the claim for 1928 and similar adjustments asked within the statutory period for 1930, gave consideration to, and made corresponding adjustments for, the intervening year, 1929, even though an untimely claim for 1929 was then before the Commissioner, since no officer of the Government can waive the statute of limitation and therefore the Commissioner was without power to make an allowance under the late claim. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528.

It follows that the petition must be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

AUSTIN ENGINEERING CO., INC., v. THE UNITED STATES

[No. 43364. Decided April 3, 1939]

On Defendant's Plea to the Jurisdiction

Government contract; completion of work; statute of limitation.—Where construction of the buildings called for by the contract was completed on May 25, 1929, and accepted by the defendant on that date, it is held that the instant suit was not barred by the statute of limitation of six years when the original petition was filed June 27, 1936; since decision on questions arising under the contract was not made, and the amount due plaintiff under the contract was not determined or paid, nor was a final voucher prepared and submitted to plaintiff for execution, as provided in the contract, earlier than July 9, 1930; voucher was transmitted to plaintiff in August 1930, and final payment was made in June 1936.

Same; date of accrual of claims.—The rule that all claims under a contract for the purpose of bringing suit accrue when the work called for by the contract is completed and accepted by the Government is not a rule of universal application where it

appears from the contract provisions and the existing facts that the amount to which the contractor may be entitled under the contract may be due and payable at a certain time depending upon certain determinations, decisions, or action after the actual completion of the work.

Same.—The statute of limitation does not begin to run until the right of action "has accrued in a shape to be effectually enforced." *United States* v. *Wirts*, 303 U. S. 414, 416.

Same.—The statute of limitation does not begin to run until the time when payment becomes due under the contract.

Same.— A cause of action or a claim under a contract does not accrue piecemeal, and where a contract contains a provision with reference to the time when the contract shall be regarded as finally concluded, the statute of limitation with reference to bringing suit does not begin to run until that date.

The Reporter's statement of the case:

Mr. Edward Gallagher for the plaintiff.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

WILLIAMS, *Judge*, delivered the opinion of the court:

This suit was brought by plaintiff June 27, 1936, to recover $55,039.82 for certain alleged extra costs and expenses arising from certain alleged extra work which, it is alleged, the defendant required plaintiff to perform for which no payment was made by the defendant under the contract and, also, for penalties for delay alleged to have been erroneously imposed and collected by the defendant.

The case is now before the court upon defendant's plea to the jurisdiction under which the defendant contends that the claim accrued May 25, 1929, when construction of the buildings called for by the contract was completed and accepted by the defendant, and that suit was therefore barred by the statute of limitation of six years when the original petition was filed June 27, 1936.

It appears from the record that on February 3, 1928, the plaintiff, a New York Corporation, and the United States, through the Bureau of Yards and Docks of the Navy Department, entered into a contract, exhibit A to the petition, which provided for the construction and completion of certain buildings to be used as quarters for junior officers and

pharmacists, and a building for quarters for nurses; a garage and storehouse, a laboratory, and an animal house, all at the Naval Operating Base at Pearl Harbor, Territory of Hawaii, in accordance with the provisions of the specifications. The time fixed in the contract for the completion of the work was 210 days after February 29, 1928. The date of actual completion and acceptance was 240 days subsequent to that date. Art. 16 (d) of the contract provided as follows:

> Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Plaintiff completed the construction of the buildings called for and they were finally accepted May 25, 1929. Decision on questions arising under the contract was not made and the amount due plaintiff under the contract was not determined or paid, nor was a final voucher prepared and submitted to plaintiff for execution, as provided in Art. 16 (d), *supra*, earlier than July 9, 1930. The question of the amount due plaintiff upon completion of the work called for by the contract and the matter of penalties for delay beyond the period specified in the contract for the completion of the buildings were, upon completion and acceptance of the work, taken under consideration by the Bureau of Yards and Docks and on July 9, 1930, the Chief of that Bureau, in accordance with Art. 16 (d), made a determination and decision denying payment of any amount for alleged extra costs and expenses for alleged extra work not covered by the contract and held plaintiff liable for delay of 189 days in the completion of the work, and assessed and collected $18,900 as liquidated damages for such delay and the further sum of $50 as a penalty for certain determined violations of the eight-hour law; thereupon the Bureau of Yards and Docks prepared a final voucher for $519.59 in accordance with Art. 16 (d) as

the unpaid remainder of the contract price ($19,469.59 less $18,950). This final voucher was transmitted to plaintiff in August 1930. On March 24, 1932, plaintiff executed and returned the final voucher to the Bureau of Yards and Docks, together with the release of all claims except as to the penalties totaling $18,900, and other extra costs and expenses under the contract. In this release the plaintiff expressly reserved the right to contest these matters. Payment of the amount of $519.59 shown to be due by this voucher, subject to the reservations, was approved and authorized by the Chief of the Bureau of Yards and Docks about June 12, 1936.

Under the facts as above stated and Art. 16 (d) of the contract under which this suit is brought, we are of opinion that the defendant's plea to the jurisdiction is without merit and should be denied. The position of counsel for defendant is that all claims of plaintiff under the contract for the purpose of bringing suit accrued when the construction work on the buildings called for by the contract was completed and such buildings were accepted by the defendant. This rule has been applied in certain cases which are not necessary to be here cited, but it is not a rule of universal application where it appears from the contract provisions and the existing facts that the amount to which the contractor may be entitled under the contract shall become due and payable at a certain time depending upon certain determinations, decisions, or action after the actual completion of the work. Where the contract or an arrangement between the parties contemplates, as here, that the amount due plaintiff under the contract for the work performed shall not become due and payable prior to certain events, it cannot be said that for the purpose of bringing suit the claim of plaintiff under the contract accrues until the date of the contemplated event, action, or decision. This rule is well established. In *United States* v. *Wurts*, 303 U. S. 414, 416, the court held that a statute of limitation does not begin to run until the right of action "has accrued in a shape to be effectually enforced." See also *Borer* v. *Chapman*, 119 U. S. 587. In *Silverman* v. *United States*, 69 C. Cls. 588, this court said: "It seems quite clear to us that the plaintiffs' cause of action on the refund allowed to it by the Secretary of War accrued on May 24,

1922. That is the date upon which plaintiffs accepted the terms of adjustment agreed upon by the Local Board of Sales Control at Boston on May 19, 1922, and signed and returned to the said board with their acceptance the voucher for $10,001.00, the amount of such refund." In the case at bar, the contract provided when the amount to which plaintiff was entitled under the contract should become due. The word "due" in Art. 16 (d) of the contract in suit is used in the sense of being payable. No item of a claim under the contract with respect to which no payment had been made became payable, in view of Art. 16 (d), until the time contemplated by that section. And this is true, notwithstanding some part of the claim reserved for suit relates to unliquidated matters. Plaintiff was not required to institute suit prior to the date when the claim became payable, and the statute of limitation did not begin to run until the time when payment became due under the contract. Under the facts in the case at bar and Art. 16 (d) of the contract, this was July 9, 1930.

In *Penn Bridge Co.* v. *United States*, 71 C. Cls. 273, the contract provided that the amount due the contractor under the contract should be determined by the Bureau of Yards and Docks whose decision should be final and conclusive, and that determination of such amount should be deferred until completion of the contract, and this court said at pp. 278, 279:

> The defendant contends that plaintiff's claim is barred by the statute of limitations, and this plea is based on the further contention that plaintiff's cause of action accrued when the machinery was delivered. We do not agree but think that the cause of action did not accrue, under the terms of the contract, until the claim had been determined and approved by the Bureau of Yards and Docks. Therefore the claim was not barred.

See also, to the same effect, *Smith Courtney Co.* v. *United States*, 46 C. Cls. 262; *Utah Power & Light Co.* v. *United States*, 67 C. Cls. 602, 606; *Manufacturers Aircraft Association, Inc.*, v. *United States*, 77 C. Cls. 481, 522, 523; *Electric Boat Co.* v. *United States*, 81 C. 361, 367.

If it be said that certain items of plaintiff's claim set forth in its petition relating to extra costs and expenses

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alleged to have resulted from extra work not contemplated by the contract are in the nature of unliquidated damages which a contractor is not, for the purpose of suit, compelled, first, to submit to the contracting officer, it is sufficient here to say that, as a general rule, a cause of action or a claim under a contract does not accrue piecemeal and that where the contract contains a provision, such as Art. 16 (d), with reference to the time when the contract shall be regarded as finally concluded the statute of limitation with reference to bringing suit does not begin to run until that date. We think that article contemplated that whatever claim plaintiff had in connection with the contract should become due in the sense of payable at the time mentioned, which, in the case at bar, was July 9, 1930. The plea to the jurisdiction is accordingly overruled. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

RICHARD FOURCHY v. THE UNITED STATES

[No. 43386. Decided April 3, 1939]

On the Proofs

Government contract; compensation of architect for extra work under change orders.—Where claims of plaintiff for additional fees, arising out of change orders calling for extra work, were submitted to the Supervising Architect of the Treasury Department, it is held that said claims were settled by the decision of the Supervising Architect in accordance with the provisions of the contract.

Same.—The question of whether there was an agreement, as claimed, was within the scope of the matter submitted to the Supervising Architect.

Same; approval by one not party to the contract.—Where it is stated in the contract that architect's fee shall not be due "until the entire scheme has the approval of the Secretary of the Treasury and the Attorney General," it is held that under the terms of the contract the approval of the Attorney General, who was not a party to the contract, was not necessary in order to enable the architect to recover payment for his services.

Same.—If it had been intended that one not a party to the contract must manifest his approval, it would have been so stated in the contract.

Same; arbitration by Supervising Architect.—While provisions of the contract with reference to arbitration are indefinite, it is held that the intention of the parties to the contract was that if there was failure to agree concerning compensation for work done under change orders, the compensation of the plaintiff therefor was to be fixed by the Supervising Architect of the Treasury, whose decision should be binding upon both of the parties.

The Reporter's statement of the case:

Mr. Henry C. Lewis for the plaintiff. *Mr. Mahlon C. Masterson* was on the briefs.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. Henry Fischer* was on the brief.

The court made special findings of fact as follows:

Under the Act of Congress of January 7, 1925, the Attorney General, the Secretary of War, and the Secretary of the Interior were authorized and directed to select a site for the establishment of an industrial reformatory, to be constructed by the labor of prisoners confined in the several United States prisons who were eligible for confinement in the reformatory authorized. The Act of May 29, 1928, made a partial appropriation for carrying out the project and provided that the total sum to be expended for such purposes should not exceed $3,000,000; and further, that if in the discretion of the Secretary of the Treasury it was impracticable to have the drawings, designs, specifications, and estimates for the construction of the necessary buildings prepared in the office of the Supervising Architect of the Treasury Department, the Secretary "may contract for all or any portion of such work to be performed by such suitable person or firm as he may select." At that time the plaintiff was and is now a member of the American Institute of Architects, registered and licensed under the laws of Louisiana and the District of Columbia, and had been an instructor in architecture and mechanical engineering at George Washington University. He was selected as the

architect for the project by the Secretary of the Treasury who had known of his reputation and years of experience in the practice of his profession both in the Government service and elsewhere.

On October 18, 1928, the plaintiff, Richard Fourchy, entered into a contract with the United States acting through the Secretary of the Treasury. A copy of this contract is attached to the petition marked "Exhibit A" and by reference is made part hereof.

Among the pertinent provisions of this contract are the following:

> That the party of the second part for the consideration hereinafter mentioned covenants and agrees with the party of the first part that the party of the second part shall furnish the party of the first part as follows:
>
> (A) Sketches showing a development scheme including block plan showing location and size of buildings, connecting corridors, roads and walks, two elevations of group buildings, or one elevation and one section of group of buildings; and description of scheme, including provisions for heat, sewage disposal, water supply, electric light and power service, ground lighting, fire protection and telephone service; description of materials and construction;
>
> (B) For individual buildings, structures, and other items in such order as may be determined upon; working drawings, large scale drawings, specifications by trades, bills of quantities by trades, detailed drawings by trades, and estimates, all to the extent necessary to carry out construction with prison labor;
>
> (C) Full size drawings, checking of shop drawings, interpretation of drawings and specifications, and necessary correspondence.
>
> It is further covenanted and agreed that, should the Secretary of the Treasury desire to make changes in the drawings and specifications after he has approved the same, then, and in that event the party of the second part agrees to make said changes and the party of the first part agrees to pay for the same such just compensation as may be agreed upon in advance between the parties hereto.
>
> And the parties hereto expressly covenant and agree that if after the approval of any drawings or specifications in connection with said building, the party of the first part deems it inexpedient to have the work exe-

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cuted as thereby shown, but requires the omission of the work as originally contemplated or its execution in accordance with other drawings, specifications, etc. (thereby depriving said party of the second part of so much of his compensation as would have been computed from the value of the work executed from said displaced plans, etc.), such just compensation, apart from the fee hereinafter stipulated shall be paid to said party of the second part as may be agreed upon in writing at the time; *provided*, that in case of the inability of said parties to agree, the Supervising Architect of the Treasury Department shall fix the value of the services so to be specifically compensated, and his decision shall be binding upon both of the parties hereto.

* * * * *

It is further agreed that the party of the second part is not to supervise nor superintend the construction of this project.

* * * * *

And it is further covenanted and agreed between the parties hereto that payment under this contract shall be based on the estimated cost of construction hereinafter given as follows: For regular and usual architectural services, except supervision, four (4) per cent on the total estimated cost of $2,807,000, plus nine-tenths (0.9) per cent on the total estimated cost of $2,807,000 for bills of quantities, specifications, and special drawings in such detail by trades that for the purchase of materials wide competition and accurate production and manufacture may be obtained, and installation by prison labor may be done accurately; one and one-half (1½%) per cent of the total estimated cost of the mechanical installations, $698,700, for providing special engineering services for mechanical installation such as heating, ventilation, electrical work, elevators, service lines, etc.

The architect's fee on the above basis is computed as follows:

Four (4) per cent for architectural services on $2,807,000	$112, 280. 00
Nine-tenths (0.9) per cent for bills of quantities, etc., on $2,807,000	25, 263. 00
One and a half (1½) per cent for mechanical engineering services on $698,700	10, 480. 50
	148, 023. 50

* * * * *

It is further agreed that the fee under division A is not due until the entire scheme has the approval of the Secretary of the Treasury and the Attorney General; for division B, until drawings, specifications, bills of quantities, etc., have been delivered and accepted; and for division C, until full-size drawings in duplicate have been provided and accepted, and the other services specified completed.

After the contract was entered into, Congress made appropriations in addition to the $400,000 provided in the Act of May 29, 1928, in the total sum of $2,561,000 for the construction of the reformatory.

Plaintiff promptly entered into the performance of the contract and performed the work contemplated therein, including changes and additions ordered by the defendant. He was engaged during a period of approximately five years in the performance of his services on the project and was at the expense of maintaining an office with clerical force employing almost constantly a number of technical experts, sometimes as many as fourteen, working exclusively on this job. Plaintiff and the officials of the Bureau of Prisons made a detailed study of the requirements of the project which resulted in the preparation and submission of preliminary plans as required under division "A" of the contract. About March 12, 1929, these plans so prepared and submitted were approved by the Secretary of the Treasury and the Attorney General.

By change orders, dated August 13, 1929, October 23, 1929, May 16, 1930, and December 3, 1931, the list of buildings and the estimated cost of each, as incorporated into the original contract, was materially modified.

These change orders eliminated many of the buildings included in the original contract, thereby relieving the plaintiff of much of the work he was originally required to do and insured that the cost of the project would remain within the limitation fixed by Congress. However, plaintiff was paid architectural fees based upon the original estimated cost of $2,807,000 set forth in the original contract, notwithstanding that the total sum appropriated was only $2,561,000 and that the actual cost of construction from

the plans furnished by the plaintiff amounted to only $1,612,672.47.

So far as changes themselves were concerned, in no instance was the plaintiff ever required to make any changes in plans or drawings which had theretofore been approved without receiving a change order calling for additional compensation.

As the work progressed a controversy arose between plaintiff and the Bureau of Prisons with reference to the design of the various buildings in the course of which the director of the Bureau of Prisons insisted that the cost of the buildings as designed by the plaintiff would exceed the appropriation for the construction thereof, and in this respect he was sustained by the engineers of the Treasury Department in a report made October 16, 1931. By a letter dated November 20, 1931, the Treasury Department requested plaintiff to make a redesign and modification of the plans for three buildings with a view to having these buildings constructed by contract rather than by prison labor. The original plans for these three buildings had previously been accepted and paid for by defendant. The three buildings so to be redesigned were specified in the letter as the assembly hall and chapel (auditorium), the school buildings, and the mess hall and kitchen, and the plaintiff was requested to submit a proposal for redesigning the mess hall and kitchen together with a revision of other buildings to be constructed by contract and a revised telephone lay-out.

The limit given the architect at this time of the expenditures for the above was $450,000. The plaintiff prepared plans for redesigning these three buildings which have been referred to in the evidence as the second set but the drawings were never approved by the Department of Justice, it apparently having been considered that they could not have been placed under contract within the limit of $450,000, although the Treasury Department afterwards admitted that they could have been. Plaintiff was instructed to prepare a new set of drawings and did so, the last or third set representing a new design without any overlapping or utilization of the previous ones.

In the meantime a controversy arose over what should be paid plaintiff for the second and third sets of drawings. The plaintiff made certain proposals with reference to a settlement of these matters and there was correspondence in regard thereto but no definite agreement was reached or concluded. Plaintiff claimed to be entitled to receive $2,500 for the second set of plans under a proposition of settlement accepted by the Treasury Department and to be entitled to payment for the third set of plans in accordance with the contract. The $2,500 was paid and a controversy again arose as to whether it was a payment for the second set of plans or in settlement of all that was due plaintiff. This whole matter is summed up in a letter written on behalf of the Treasury Department by the Director of the Procurement Division thereof dated July 26, 1934. In this letter reference was made to plaintiff's "claim of July 18 amended October 1, 1932, in amount $17,317.65 for services performed in the preparation of the third, final, set of drawings for the Mess Hall and Kitchen, School, and Auditorium Buildings." This letter contained statements as follows:

> It is the contention of the Architect [plaintiff] and his attorney that owing to the fact that the right reserved by the Government by paragraph starting page three, line 6, of the contract, reading in part as follows: "that in case of the inability of the said parties to agree, the Supervising Architect of the Treasury Department shall fix the value of the services so to be specifically compensated and his decision shall be binding upon both of the parties hereto;" has not been exercised, the claimant had been without the benefit of a definite award made under the terms of the contract, at the time that this claim was under consideration by your office.
>
> To supply this deficiency and by virtue of the understanding that your office is open to further submissions in this case, the following review and recommendation are offered.
>
> According to the records of the Division the original, first, set of drawings, specifications and bills of quantities for the three buildings in question, were completed, approved, and paid for as provided by the contract.

The necessity having developed for making changes in the scheme the architect was requested to submit a proposal, as it applied to these buildings, as follows:

(1) Assembly Hall and Chapel—Omit one bay.

(2) School Building—Omit one story and fit up basement for school.

(3) Mess Hall and Kitchen—Reduction in size, involving new designs and working drawings.

(4) Specifications for all to permit construction by general contract.

The limit given the Architect at this time, of the expenditure for the above, was $450,000.00.

The Architect's proposal in amount of $2,500.00 was accepted by Department letter of December 3, 1931, the work was done and was paid for, but the drawings were never approved by the Department of Justice, it apparently having been considered that they could not have been placed under contract within the limit of $450,000.00.

As it is understood that these drawings were never submitted to bidding, this point was evidently not determined. However, the Architect contends that the work would have been constructed within that limit, and the estimate of the Office of the Supervising Architect confirmed this contention.

The Architect then prepared an entirely new set of drawings for these three buildings, which were, as your records of the case will show, approved and employed as the basis of construction contracts.

The Division has in its possession the original set of drawings for these buildings, the revised set prepared under the acceptance of December 3, 1931, for $2,500.00, and the final, construction contract set above referred to; and upon which the Architect's claim has been based.

A comparison has been made of the various sets and it is found that the last set represents distinctly new design showing no overlapping or utilization of the previous ones.

It has all along been the opinion of the Department as expressed on several occasions, that the service performed by the Architect in producing this third set of drawings was one not compensated for in the contract fee, nor by the $2,500.00 extra allowed December 3, 1931.

This opinion was expressed in the Department letter to your office of October 20, 1932, but as no action had at that time been taken by the Supervising Architect to

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fix, in accordance with the above-quoted provision of the contract, "the value of the services so to be specifically compensated," no amount was recommended.

In response to the architect's request that this provision of the contract be carried out, the Supervising Architect's Office has made, on the basis of its experience with the value of such services, an estimate of the reasonable cost of the performance of this work in its several branches, resulting in a figure of $5,210.22 for payroll expenditures.

To this it is customary to add an allowance of 50% for overhead expenses (rent, light, supplies, etc.) and 50% for the professional services of the Architect, making in this case a total of $10,420.44.

It is therefore the opinion of this Division that the architect is justly entitled under the terms of his contract to payment in addition to his fee, and to previous payments allowed apart therefrom, of the above indicated amount of $10,420.44, and in ordinary course of procedure such payment would be authorized by the Division.

In view, however, of the circumstances surrounding this case, of your previously expressed opinion in the matter, and of the verbal consent of your office to give further consideration thereto, the above statement is submitted with the recommendation that authority be given for payment.

Any additional information or detail which you desire will be furnished promptly upon request.

The evidence as a whole shows that it was understood by the Treasury that $2,500 should be paid plaintiff for what is referred to in the above letter as the revised set of plans and that afterwards a third set, which is referred to in the letter as the "final construction contract set," was prepared pursuant to the defendant's request and the provisions of the contract with reference to change orders. The matter of compensation for what is called the third set of drawings was submitted to the Supervising Architect of the Treasury who found, as set out above in the letter, that plaintiff was entitled to additional compensation in the sum of $10,420.44 and the payment thereof was recommended to the Comptroller General.

The payment recommended, as shown by the statements of the letter above quoted, was not made and subsequently

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by reason of an adverse opinion rendered by the Assistant Attorney General the recommendation of the Treasury for the payment, as stated in the letter, was withdrawn.

A controversy also arose with reference to a matter not mentioned in the above letter. As plaintiff proceeded with the work required of him under the contract, about three years after the preliminary sketches had been approved he submitted plans for a low-pressure steam-distribution system and a centralized hot-water system. These designs were not approved on the ground that the cost thereof would have exceeded the amount allotted to that portion of the project and plaintiff was required to design plans for a high-pressure steam system and localized hot-water system. He complied with the requirement and his designs were accepted and paid for although they were never used. Plaintiff now claims $3,520 for the working drawings for the first design of this heating system.

Among the change orders made by defendant was one eliminating ground lighting and the garage and fire engine station from plaintiff's contract. Plaintiff did no work on these eliminated items other than the preliminary sketches called for under division A of the contract for which he was paid.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This suit is brought to recover $33,394.80 as a balance due for architectural services.

It appears that under the Act of Congress of January 7, 1925 (43 Stat. 724), the construction was authorized for the necessary buildings of the United States Industrial Reformatory to be located at Chillicothe, Ohio. The original act provided that prisoners confined in the several United States penitentiaries, prisons, or reformatories should be employed in the construction of the buildings thereof. The Act of May 29, 1928 (45 Stat. 883, 906), made a preliminary appropriation for the purpose of carrying out the project and authorized the Secretary of the Treasury, if in his discretion it would be impracticable to have the plans therefor prepared

in the office of the Supervising Architect of the Treasury Department, to "contract for all or any portion of such work to be performed by such suitable person or firm as he may select." In accordance with this provision, the Secretary selected the plaintiff as a suitable person to prepare the plans, drawings, designs, specifications, and estimates necessary and entered into a contract with him for that purpose on October 18, 1928. The contract is set out in full in Exhibit A attached to the petition and the portions thereof which bear specially upon the matters involved in this suit are set out verbatim in the findings. A reading of these provisions shows that the work to be performed and the manner in which payment was to be made were specified in detail.

Plaintiff promptly entered into the performance of the contract and performed the work contemplated therein including changes and additions ordered by the defendant. He was engaged during a period of approximately five years in the performance of his services on the project, and was at the expense of maintaining an office with clerical force employing almost constantly a number of technical experts, sometimes as many as fourteen working exclusively on this job. Plaintiff and the officials of the Bureau of Prisons made a detailed study of the requirements of the project which resulted in the preparation and submission of preliminary plans as required under division A of the contract. On March 12, 1929, the plans so prepared and submitted were approved by the Secretary of the Treasury and the Attorney General. In accordance with the contract, plaintiff was subsequently paid architectural fees on the estimated cost of $2,807,000 as set forth therein. The controversy in the case arises under claims made by the plaintiff for work under what are commonly called change orders, with one exception which will be hereinafter noted.

There are four items upon which plaintiff seeks a recovery:

(1) $1,724.80 as a balance due by reason of the elimination by the defendant of ground lighting and garage and fire engine building;

(2) $7,500 as a balance due for redesigning and making new working drawings for mess hall and kitchen, and for

revision of design of school and auditorium (assembly hall and chapel);

(3) $20,650 for a design of the buildings described in paragraph (2) above; or, in the alternative, $10,420.44 as an arbitrated amount due under the decision of the Supervising Architect of the Treasury pursuant to the provisions of the contract;

(4) $3,520 for working drawings for a low pressure steam distribution system and a centralized hot water system.

The evidence shows that as the work progressed a controversy arose between the plaintiff and the Director of Prisons, the latter claiming that the cost of construction of the project in accordance with the plans, drawings, and details submitted by the plaintiff would exceed the limit of the appropriations made therefor. The plaintiff claims that this objection was unfounded. The controversy between the two became acrimonious and apparently considerable feeling was engendered between them. Each seems to have been partly right and partly wrong, but we have made no finding thereon because under our view of the law of the case what took place between the two is immaterial for several reasons. The important question is as to what matters were in disagreement or dispute between the plaintiff and defendant and how they were settled.

We think that all of the claims of plaintiff arising out of change orders were settled by the decision of the Supervising Architect in accordance with the provisions of the contract and that this will appear from a consideration of the evidence as shown by the findings.

It appears that the plaintiff was required to submit a proposal for redesigning the mess hall and kitchen together with assembly hall and chapel, and school building. Plaintiff prepared plans for redesigning these buildings, which plans have been referred to in a discussion of the evidence as the second set, but the drawings were never approved, it apparently having been considered that they could not have been carried out without exceeding the appropriation although the Treasury Department afterwards admitted that they could have been. The plaintiff was instructed to prepare a new set of drawings and

did so, this last or third set representing a new design without any overlapping or utilization of the previous ones as shown by the Treasury letter to which reference will hereinafter be made. A controversy and dispute arose as to what should be paid the plaintiff for the second and third sets of the drawings. Plaintiff made a certain proposal with reference to the settlement of these matters and there was correspondence in regard thereto but no definite agreement was reached or concluded. Plaintiff claimed to be entitled to receive $2,500 for the second set of plans under a proposition of settlement accepted by the Treasury Department and to be entitled to payment for the third set in accordance with the contract. The $2,500 was paid and a controversy again arose as to whether it was in payment for the second plans or in settlement of all that was due plaintiff under the change orders as claimed by defendant. Finally plaintiff asked to have the matters in dispute submitted to the Supervising Architect to determine how much was due him, in accordance with the provisions of the contract when disputes arose over work done under change orders. The results of this submission are summarized in a letter written in behalf of the Treasury Department to the Comptroller General by the Director of the Procurement Division thereof dated July 26, 1934, which reviewed the matter in dispute and stated the facts in relation thereto. This letter, the material parts of which are set out verbatim in the findings, is we think the best kind of evidence of the facts recited therein. It shows definitely that the Treasury understood that the $2,500 was paid for drawing what is called the second set of plans and that a new set of drawings was ordered and prepared representing a "distinctly new design showing no overlapping or utilization of the previous ones". It also shows that plaintiff's claim for further compensation was submitted to the Supervising Architect pursuant to the terms of the contract and that he found plaintiff to be entitled to additional compensation therefor in the sum of $10,420.44. The payment of this amount was accordingly recommended. The letter, when considered together with all the other evidence bearing on this matter, amply sup-

ports plaintiff's alternative claim for compensation for the third set of plans in the sum found by the Supervising Architect. In this connection it should also be said that it is unreasonable to believe that the plaintiff prepared two additional sets of plans and specifications under change orders, each one worth according to the ordinary scale of architect's fees as shown in the letter over $10,000, and agreed to accept $2,500 as payment for both.

Counsel for defendant call attention to the fact that the Treasury Department eventually withdrew its recommendation for payment of plaintiff's claim in the sum of $10,-420.44 pursuant to the decision of the Supervising Architect, and also to the opinion of the Assistant Attorney General, who held that the matter was not a proper subject of arbitration before the Supervising Architect for two reasons, first, because there had been an agreement that the $2,500 should be in full payment of the second and third sets of drawings, but we have found the fact to be otherwise. Moreover, the question of whether there was an agreement was within the scope of the matter submitted to the Supervising Architect. The other objection was that the second set of plans was never approved by the Attorney General, but we think it clear that under the terms of the contract the approval of the Attorney General was necessary only to the preliminary sketches for the "development scheme" as provided by division A of the contract. (See the last paragraph of the portion of the contract quoted in the findings.)

It will be observed that the Attorney General was not a party to the contract which, by the terms thereof, was made and entered into between the United States acting by the Secretary of the Treasury on the first part, and the plaintiff as of the second part. The obvious purpose of the project was to provide a reformatory in which prisoners committed under the Federal law could be confined. Manifestly the Attorney General's department would be interested in the general nature of the scheme. Hence the contract required that he should approve the "development scheme" which comprised the preliminary plans or sketches required by division A. The contract provided that fees were not due

under division B until drawings, specifications, bills of quantities, etc., had been accepted, and under division C until full size drawings in duplicate had been accepted. It does not state definitely by whom, but in the absence of an express provision the acceptance would be by the other party to the contract which was the Secretary of the Treasury. If it had been intended that one not a party to the contract must manifest his approval, naturally it would have been so stated. It should also be noted that the construction which we have given to the contract was followed by the parties thereto as it was being carried out.

The opinion of the Assistant Attorney General further recites that the provision for arbitration does not cover the matters in dispute. The provisions of the contract with reference to this matter are not as definite as they should be. In two different places the abbreviation "etc." is used instead of particular expressions, but on the whole it is quite clear (taking into consideration the circumstances of the case) that the intention of the parties to the contract was that if they were unable to agree as to what should be paid for work done under change orders, that is, work done after the approval of the drawings or specifications requiring the work to be done under other drawings or specifications, the compensation of the plaintiff was to be fixed by the Supervising Architect of the Treasury and that his decision should be binding upon both of the parties. In this connection we would say also that the testimony as a whole showed that the contingency provided for by the contract had taken place and we have so found.

It is true that the Treasury Department in consequence of the opinion of the Assistant Attorney General withdrew its recommendation of the payment of the amount found to be due by the Supervising Architect, but his finding was not withdrawn. Indeed we doubt whether it could be, and our conclusion is that it is binding on both parties.

The finding of the Supervising Architect of the Treasury specifically disposes of all claims of the plaintiff with reference to redesigns and working drawings for mess hall and kitchen and revision of design for school and auditorium. So far as the item of $1,724.80 claimed to be due by reason

of elimination by the defendant of ground lighting and garage and fire engine building is concerned, this was another change order. It was permitted by the contract and plaintiff did no work on these eliminated items other than the preliminary sketches called for under division A of the contract for which he was paid. Consequently there is nothing due thereon.

It may be questioned whether the claim for $3,520 for working drawings for a low-pressure steam-distribution system and centralized hot-water system was covered by the finding of the Supervising Architect, but in any event it was work which we think was contemplated and required by the original contract, and the first set of drawings was not approved by the Treasury because the cost of construction would have exceeded the amount allotted to that portion of the project. The second set of plans for the heating system was accepted, approved, and paid for although not used. Consequently there was nothing due thereon.

Judgment will be rendered in favor of the plaintiff for $10,420.44, which is the amount found due by the Supervising Architect. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

JOHN W. DAVIS v. THE UNITED STATES

[No. 43413. Decided April 3, 1939]

On the Proofs

Income tax; transfer of stock in reorganization.—Where plaintiff held the stock in the Neidich company of New Jersey, for which he received in 1929 shares of stock of the Underwood-Elliott-Fisher Company, in accordance with the provisions of a contract, January 3, 1929, under which all of the assets of the Neidich corporation were acquired by a new Delaware corporation, caused to be formed for that purpose by the Underwood company, which became the sole owner of all the stock of the new Delaware corporation, it is held that the Underwood company was not "a party to a reorganization" within the meaning of Section 112 (g) of the Revenue Act of 1928.

Reporter's Statement of the Case

Same; effect of book entries.—Book entries tending to show a transfer from the New Jersey corporation to the Underwood company and then from the Underwood company to the Delaware corporation are, in view of the facts as to what actually occurred, held to be of no controlling importance. *Groman* v. *Commissioner of Internal Revenue*, 302 U. S. 82, and *Helvering* v. *Bashford*, 302 U. S. 454, cited. *Helvering* v. *Minnesota Tea Company*, 296 U. S. 387, distinguished.

The Reporter's statement of the case:

Mr. Thomas G. Haight for the plaintiff. *Mr. Robert H. Montgomery* and *Mr. J. Marvin Haynes* were on the brief.

Mr. Samuel E. Blackham, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiff sues to recover $24,671.49, alleged overpayment of income tax for 1929, with interest. This tax resulted from the action of the Commissioner of Internal Revenue in including in income for that year an amount determined by him to represent a gain upon the receipt of stock of the Underwood-Elliott-Fisher Company in a certain transaction in 1929 which plaintiff contends was a transaction involving a non-taxable exchange under section 112 of the Revenue Act of 1928 arising out of a reorganization to which, it is alleged, the Underwood Company was a party. The facts are not in dispute. The only question is whether the Underwood-Elliott-Fisher Company, certain stock of which plaintiff received and which the Commissioner held resulted in a taxable gain, was a party to a reorganization within the meaning of section 112 (b) (3), (g), and (i) of the Revenue Act of 1928 (45 Stat. 791, 816, 818) and Art. 577 of Regulations 74.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. On January 3, 1929, plaintiff, a resident of Downingtown, Pennsylvania, was the owner of 440 shares of capital stock of the Neidich Process Company, a New Jersey Corporation, with principal office at Burlington. At that time this corporation was negotiating with the Underwood-

Elliott-Fisher Company, a Delaware corporation. January 5, 1929, the Board of Directors of Neidich Process Company, hereinafter sometimes referred to as the Neidich Company, approved a contract dated January 3, 1929, with the Underwood-Elliott-Fisher Company, hereinafter sometimes referred to as the Underwood Company. This action of the Board of the Neidich Company was approved at a meeting of the stockholders of that company held January 5, 1929. At this meeting the stockholders authorized and directed officers of the Neidich Company to execute and deliver the required agreement and to do whatever else might be necessary to accomplish the results intended. A copy of the minutes of this stockholders' meeting is in evidence as exhibit 2 and is made part hereof by reference.

2. January 5, 1929, plaintiff and Samuel A. Neidich, who was president of the Neidich Process Company (of New Jersey), entered into an agreement, as follows:

> WITNESSETH, Whereas Davis has sold, assigned and transferred unto Neidich 440 shares of the capital stock of the Neidich Process Company, a Corporation of the State of New Jersey, located and transacting business at the City of Burlington aforesaid, for the purpose of making it possible to sell and convey the assets and business of the said Neidich Process Company to the Underwood-Elliott-Fisher Corporation, in payment for which stock Neidich is to deliver unto Davis, his heirs or assigns, capital stock of the said Underwood-Elliott-Fisher Corporation at the ratio of five and one-half shares thereof for each share of the Neidich Process Company stock sold and transferred by Davis to Neidich.
>
> NOW THIS AGREEMENT WITNESSETH, That Neidich in consideration of the premises and the sum of ONE DOLLAR to him in hand paid by Davis, the receipt of which is hereby acknowledged, has agreed and does hereby agree to assign, transfer and deliver unto Davis, his heirs or assigns, prior to April 1st, 1929, a sufficient number of shares of the capital stock of the Underwood-Elliott-Fisher Corporation to equal the number of shares of the Neidich Process Company stock sold and transferred as aforesaid to Neidich at the ratio of five and one-half shares of the Underwood-Elliott-Fisher Corporation to one of the Neidich Process Company; it being understood and agreed that Davis shall be entitled to have and receive such dividend or dividends as may be declared and

paid on the stock of the Underwood-Elliott-Fisher Corporation on and after January 1st, 1929, as well as any and all other benefits and advantages that may belong to said stock or to which it may become entitled from and after January 1st, 1929.

In accordance therewith plaintiff delivered to Neidich the 440 shares of stock which he then owned in the Neidich Company, receiving from Samuel A. Neidich therefor a so-called "due bill," as follows:

> Due to John W. Davis, of Burlington, New Jersey, 2,420 shares of capital stock of the Underwood-Elliott-Fisher Corporation to be transferred and delivered to him prior to April 1, 1929, together with such dividend as may be declared and/or paid thereon on and after January 1, 1929.

Each of the other stockholders of the Neidich Company (of New Jersey) entered into a similar agreement with Samuel A. Neidich and received a similar due bill from him upon the delivery by each stockholder of his shares of stock in the Neidich Process Company (of New Jersey).

3. In Art. 1 of the contract of January 3, 1929, between Neidich Process Company, the New Jersey corporation, the Underwood-Elliott-Fisher Company, and Samuel A. Neidich, the Underwood Company agreed forthwith to cause to be organized under the laws of Delaware, or under the laws of such other state as it might determine in its discretion, a corporation having the name of Neidich Process Company or such other name as the Underwood Company should designate (hereinafter sometimes called the "New Company"). The New Company was to have such capitalization and powers as the Underwood Company, in its discretion, should determine, and of which the Underwood Company would own all the issued and outstanding capital stock. In Art. 2 of the contract the Neidich Company (of New Jersey) agreed to sell, assign, transfer, and convey to the New Company and the Underwood Company agreed that the New Company would purchase all the property and assets of every kind and nature, except the corporate franchise owned by the Neidich Company.

Reporter's Statement of the Case

Art. 3 of the contract provided that in full payment for the designated property of the Neidich Company (of New Jersey) the Underwood Company agreed, so far as material here, (1) that it and the New Company would cause to be delivered to the Neidich Company (of New Jersey) 21,005 shares without par value of the common stock of the Underwood Company; (2) that the New Company would assume all the liabilities of the Neidich Company (of New Jersey) shown on its balance sheet as of December 31, 1928, other than liabilities for capital stock, surplus, and undivided profits; and (3) that the New Company would assume all material purchase contracts of the Neidich Company which did not extend beyond 1929 or which could not be canceled at the option of the buyer at the end of 1929. Certain other liabilities mentioned in the contract were to be assumed by the New Company. In the concluding sentence of this article it was provided and agreed that the New Company would not assume and would not be liable for any taxes for 1928 or any prior year, or years. Art. 4 provided that the New Company should have the exclusive use of the name "Neidich Process Company." In accordance with this article, the old company changed its name to Burlington Research Company.

Art. 5 provided for the delivery by the old company of all deeds, bills of sale, instruments of transfer and assignment necessary to vest title in the New Company to all the properties and assets, and that such instruments should be in form approved by counsel for the Underwood Company. Art. 7, so far as material here, is as follows:

> As an inducement to the Underwood Company to enter into this agreement and on which it is agreed the Underwood Company has relied in entering into this agreement, and as a continuing obligation, the Neidich Company and Neidich jointly and severally agree and represent:
>
> * * * * *
>
> (b) that, except for directors' qualifying shares, Neidich now is or will be by the date of the closing hereof, the owner in his own right of all the shares of such issued and outstanding capital stock.

Art. 9 provided in part as follows:

> If the audit of the net earnings of the Neidich Company for the period of three and one-half years ended June 30, 1928, as certified by Messrs. Touche, Niven & Co., shall show, after deductions of and for all income taxes, that such net earnings as so certified are less than an average of $170,211 per annum, the Neidich Company and Neidich jointly and severally agree that for each dollar of such deficiency they will transfer and deliver to the Underwood Company $7.10 in common stock of the Underwood Company, taking the common stock of the Underwood Company at $87 per share, or at the option of the Underwood Company they will make payment to the Underwood Company on such basis in cash.

Art. 11 provided that the closing of the contract should be effective as of January 1, 1929, and Art. 12 set forth that—

> The Neidich Company and Neidich jointly and severally agree that the operations of all the aforesaid property and assets have been and will be conducted in the usual and ordinary manner and for the account of the New Company from December 31, 1928, to the date of closing hereof. The Underwood Company agrees that the New Company will assume all liabilities incurred in connection with such operations from such date to the date of closing hereof.

Other provisions of the contract to and including Art. 17 are not necessary to be here set forth. The contract is in evidence as exhibit 1 and is made a part hereof by reference.

4. Subsequently, and pursuant to the aforementioned agreement of January 3, 1929, a new corporation was organized under the laws of the State of Delaware by the name of the Neidich Process Corporation. Ten subscribing shares were paid for at the rate of $30 a share (these shares were later transferred to the Underwood Company). The Board of Directors of the new company (Neidich Process Company, of Delaware) at its first meeting resolved to accept and authorized its officers to execute an acceptance of an offer from the Underwood-Elliott-Fisher Company dated January 15, 1929, a copy of which is in evidence as exhibit 4A and is made a part hereof by reference. In this offer the Underwood Company proposed to the Neidich Process Com-

pany (of Delaware) that it would cause to be conveyed and transferred to the new Delaware Company the physical properties and other assets, except franchises and such property and assets as were not transferable, of the Neidich Process Company (of New Jersey) subject to certain liens and cause such property and assets to be operated for the account and benefit of the Delaware Corporation from December 31, 1928, to the date of the conveyance and transfer by the New Jersey Corporation of such property and assets to the Delaware Corporation. In exchange for such property and assets, the proposal of the Underwood Company provided that the new Neidich Process Company (of Delaware) should pay to the Underwood Company $300 in cash; issue and deliver to the Underwood Company, or upon its order, a certificate or certificates for 4,190 shares of full paid and non-assessable stock without par value of the new Delaware Corporation, and that the new company would assume certain specified liabilities of the Neidich Process Company of New Jersey which were the same liabilities as mentioned in the agreement of January 3 between the New Jersey Company and the Underwood Company.

5. The new Delaware Company accepted the proposal of the Underwood Company and at the closing of the contract dated January 3, 1929, hereinbefore referred to, simultaneously with the transfer by the old Neidich Process Company (of New Jersey) of its property and assets to the new company (Neidich Process Company of Delaware) by bill of sale and deed, and the issuance of 4,190 shares of the stock of the new Delaware Company to the Underwood Company, the Underwood Company delivered to the old company (Neidich Process Company of New Jersey) a due bill for 21,005 shares of common stock of the Underwood Company, which due bill was made payable to the Burlington Research Company (the new name of the old Neidich Process Company of New Jersey). A correct copy of the bill of sale from the Burlington Research Company (formerly Neidich Process Company of New Jersey) to the Neidich Process Company of Delaware is in evidence as exhibit 4B and is made a part of this finding by reference. The deed from the old Neidich Company of New Jersey

transferring its real estate to the new Delaware Company was executed in the same form as the bill of sale.

6. The books of the Underwood Company recorded the issuance of the 21,005 shares of its stock as follows:

> To record on the books of U. E. F. Co. the issuance of 21,005 shares in exchange for the assets of the Neidich Process Co. in accordance with the resolution of the Board of Directors of January 10, 1929.

The books of the new company (Neidich Process Company of Delaware) recorded the issuance of its 4,190 shares of stock (other than the ten subscribers' shares) to the Underwood Company as follows:

> To reflect the acquisition from Underwood-Elliott-Fisher Co. Vendor of the property formerly owned by Neidich Process Company (a New Jersey Corp.) and the assumption of certain liabilities in connection therewith as set forth in the minutes of the board of directors, January 15, 1929. This property less $300.00 in cash, is the consideration received for 4,190 shares of the capital stock of the company.

7. Subsequent to January 5 and prior to March 7, 1929, the old New Jersey Corporation whose name had then been changed to Burlington Research Company received from Underwood-Elliott-Fisher Comanpy 21,005 shares of stock of the Underwood Company under and in accordance with the contract between the New Jersey Company and the Underwood Company of January 3, 1929.

8. On March 6, 1929, the Board of Directors of the Burlington Research Company adopted the following resolution:

> That the proper officers of this Company be and they hereby are authorized and directed to distribute to the stockholders of this Company according to their prorata interest, the 21,005 shares without par value of the Common Stock of Underwood-Elliott-Fisher Company owned by and standing in the name of this Company upon the prior receipt from the stockholders of this Company of a letter indemnifying and saving harmless the directors of this Company from any and all liability which may be occasioned by or result from such distribution; and further

RESOLVED that the President and Treasurer of this Company be and they hereby are authorized and directed to convey, transfer and assign to S. A. Neidich, the certificates for 21,005 shares without par value of the Common Stock of Underwood-Elliott-Fisher Company, owned by and standing in the name of this Company; and further

RESOLVED that the proper officers of this Company be and they hereby are authorized and directed to execute such further instruments and do such further acts as may be necessary or in their opinion desirable to carry out the foregoing resolutions.

9. The distribution and transfer of the stock of the Underwood Company authorized in the foregoing resolution were duly made, and prior to March 25, 1929, Samuel A. Neidich, in accordance with the "due bill" of January 5 hereinbefore quoted in finding 2, transferred and delivered to plaintiff 2,420 shares of the aforementioned 21,005 shares of the Underwood-Elliott-Fisher Company stock. Samuel A. Neidich also transferred and delivered the balance of the 21,005 shares of stock of the Underwood Company to the following individuals holding the so-called "due bills" from Neidich: Ira J. Davis, 204 shares; George A. Lance, 165 shares; S. S. Garwood, 38 shares. Neidich retained 18,178 shares of the Underwood Company's stock for himself.

10. The respective shareholdings in the Neidich Process Company of New Jersey (the old company) immediately prior to the execution of the contract between that company and the Underwood Company on January 3, 1929, were as follows: S. A. Neidich, 3,305; John W. Davis, 440; Ira J. Davis, 37; George A. Lance, 30; S. S. Garwood, 7.

11. Plaintiff filed his income tax return for 1929 showing a tax of $735.50, payment of which was made in quarterly installments, the first installment of $183.88 being paid on March 15, 1930. The remaining installments were paid on or before their respective due dates.

Subsequent to the filing of this return and the payment of tax shown thereon, the Commissioner of Internal Revenue, upon an examination and audit thereof, assessed an additional tax and interest of $24,671.49, which was paid by

plaintiff in the amounts of $5,000 on February 20, 1931, $10,000 on April 10, 1931, and $9,671.49 on April 15, 1931. The additional tax was wholly attributable to the inclusion in plaintiff's income of the gain or profit determined by the Commissioner to have arisen from the exchange by the taxpayer of 440 shares of stock of the Neidich Process Company of New Jersey for 2,420 shares of Underwood-Elliott-Fisher stock in connection with the sale and transfer by the New Jersey Company of all its property and assets to the new Delaware Company, as hereinbefore fully set forth in connection with the contract of January 3, 1929.

12. November 30, 1932, plaintiff filed a claim for refund for 1929 of the additional tax and interest totaling $24,-671.49. In a letter of August 31, 1934, in evidence as exhibit 7 and made a part hereof by reference, the Commissioner advised plaintiff that the claim for refund would be disallowed. The claim was formally rejected September 11, 1934. Thereafter, on March 23, 1936, plaintiff filed an application for reconsideration of the claim and this application was denied by the Commissioner August 24, 1936.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the Court:

The questions presented are (1) Whether the stock of the Underwood Company which plaintiff received in 1929 as a result of the transfer by the Neidich Company of New Jersey of its property and assets to the new Neidich Company of Delaware was stock of a corporation a party to a reorganization on which no gain or loss should be recognized under the provisions of section 112 of the Revenue Act of 1928[1]—that is, whether the Underwood Company was a party to a

[1] RECOGNITION OF GAIN OR LOSS.
(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.
(b) *Exchanges solely in kind.*—* * *
(3) *Stock for Stock on Reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

reorganization; and (2) If the Underwood Company was a party to a reorganization, whether, at the time of the reorganization, the plaintiff was a shareholder in the old New Jersey Company.

Plaintiff contends that although the contract of January 3, 1929, between the old New Jersey company and the Underwood Company contemplated that the Underwood Company would, for convenience, form a new wholly-owned corporation to take title to the assets of the New Jersey corporation, the substance of the transaction was the acquisition of these assets by the Underwood Company; that the Underwood Company was therefore a "party to a reorganization" within the meaning of section 112 (i) (2) of the statute and the stock of the Underwood Company received by him was stock in a corporation a party to a reorganization within the meaning of section 112 (g). It is argued by plaintiff that Congress did not intend to make a distinction between a case

(4) *Same—Gain of Corporation.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * *

(g) *Distribution of stock on reorganization.*—If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

* * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) *Definition of control.*—As used in this section, the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation. (45 Stat. 719, 816, 818.)

where the stock of one corporation is received in exchange for the stock of another when the assets of the latter have been acquired *directly* by the former in consideration of such exchange of stock and a case like the one at bar where the stock is received in a transaction identically the same, except for the fact that the corporation, the taxability of whose stock is involved, takes the assets through a wholly-owned subsidiary.

We are of opinion from the facts presented and upon the decided cases that the Underwood Company, the stock of which plaintiff received, was not a party to a reorganization within the meaning of the statute and that such stock is not to be excluded under section 112 (g) in the determination of plaintiff's tax for 1929. It is agreed that, if this interpretation of the statute is correct, the additional tax and interest determined and collected by the Commissioner were due and that plaintiff is not entitled to recover.

What actually occurred was that under the contract of January 3, 1929, between the Neidich Company of New Jersey and the Underwood Company the latter agreed to cause a new corporation to be organized under the laws of Delaware. The Underwood Company was to own all the issued and outstanding capital stock of the new company. The old Neidich Company of New Jersey agreed to sell to the new company of Delaware and the Underwood Company agreed that the new Delaware company would purchase all the property and assets of the old New Jersey company in payment for which the Underwood Company agreed that it and the new Delaware Company would cause to be delivered to the old New Jersey company 21,005 shares of the stock of the Underwood Company and that the new Delaware Company would assume the liabilities of the old New Jersey company with certain minor exceptions. This transaction was carried out strictly in accordance with the contract. The Underwood Company organized the new Delaware Company, taking all of its issued stock. The old New Jersey Company by a bill of sale and deed transferred all of its property and assets to the new Delaware Company and received from the Underwood Company the 21,005 shares of its common stock which the old New Jersey Company distributed to its

then sole stockholder—Samuel A. Neidich, and Neidich, pursuant to his contracts with the former shareholders of the old New Jersey Company distributed to them, in the proportions agreed upon, certain stock of the Underwood Company.

This was the substance of the transactions and we are of opinion that certain book entries by the Underwood Company and the new Delaware Company tending to reflect a transfer from the old New Jersey Company to the Underwood Company and then from the Underwood Company to the new Delaware Company are, in view of the facts as to what actually occurred, of no controlling importance. Stripped of the unessential formalities, the essence of the transaction was the issuance by the Underwood Company of 21,005 shares of its own stock for 4,190 shares of stock of the new Delaware Corporation and the delivery of 21,005 shares of stock of the Underwood Company to the old New Jersey corporation in exchange for the acquisition by the new Delaware corporation of the assets and property of the old company. In the accomplishment of the completed transaction, the delivery by the Underwood Company of its stock direct to the old New Jersey Company was, in legal contemplation, the same as the issuance by the Underwood Company of its stock to the new Delaware Corporation in exchange for all the stock of the Delaware Corporation and the delivery by the Delaware Corporation of the stock of the Underwood Company to the old New Jersey Company. The cases of *Groman* v. *Commissioner of Internal Revenue*, 302 U. S. 82, and *Helvering* v. *Bashford*, 302 U. S. 454, require these conclusions.

In the *Groman case* it appeared that the plaintiff and all other stockholders of Metals Refining Company, an Indiana corporation, entered into a contract with the Glidden Company, an Ohio Corporation, reciting that the shareholders of Indiana were desirous of merging and consolidating the properties of their company with the Glidden Company and with a new corporation that Glidden was to organize under the laws of Ohio. The shareholders of the Metals Company agreed that they would assign their shares to the new Ohio corporation which was to have a specified capital structure divided into preferred and common shares, and the Glidden

Company agreed that it would issue and deliver, or cause to be issued and delivered, to the shareholders of the Metals Company a stated number of shares of the Glidden Company's own prior preference stock at an agreed valuation, a stated number of shares of the preferred stock of the new Ohio Company, also at an agreed valuation, and sufficient cash to equal the appraised value of the Metals Refining Company's assets as of March 1, 1929, and that, after the exchange of stock, the Glidden Company would cause the Metals Company to transfer its assets to the new Ohio company. This transaction was carried out and, as a result, Groman received certain shares of the stock of the Glidden Company, shares of the new Ohio stock, and $17,293 in cash. In his return for 1929 Groman included the cash as income but did not include the shares of stock of the Glidden Company and of the new Ohio company, claiming, as plaintiff here claims, that the stock of the Glidden Company was received in exchange in a reorganization and that the Glidden Company was a party to a reorganization within the meaning of section 112 of the Revenue Act of 1928. The Commissioner of Internal Revenue held that the Glidden Company was not a party to a reorganization and that the stock received by Groman in that company was taxable in 1929 to the extent of the gain derived from the exchange. The court held that the Glidden Company was not a party to the reorganization and that the gain to Groman through the receipt by him of the stock of the Glidden Company was taxable in 1929. The court in construing the reorganization sections of the Revenue Act of 1928 said, at p. 89: "* * * where, pursuant to a plan, the interest of the stockholders of a corporation continues to be definitely represented in substantial measure in a new or different one, then to the extent, but only to the extent, of that continuity of interest, the exchange is to be treated as one not giving rise to present gain or loss."

In *Helvering* v. *Bashford*, *supra*, it appeared that the Atlas Powder Company, being desirous of eliminating the competition of Peerless Explosives Company, Union Explosives Company, and Black Diamond Powder Company and deeming it unwise to do so by buying either their stock

or assets, conceived and consummated a plan for consolidating the three competitors into a new corporation with Atlas to get a majority of the stock of such new corporation. To this end the holders of the stock of the three companies mentioned were approached by individuals representing the Atlas Company, and their agreements to carry out the plan were obtained. The new Ohio corporation was formed and became the owner, practically, of all the stock and all the assets of the Peerless, Union, and Black Diamond companies. The Atlas Company became the owner of all the preferred stock and 57 per centum of the common stock of the new corporation; and, in exchange for the stock in the three old companies mentioned, each of the former stockholders of such old companies received some common stock in the new company, some Atlas Company stock, and some cash which Atlas supplied. Upon these facts the court, at page 457, said: "Applying the rule [announced in *Groman* v. *Commissioner*, *supra*, p. 89] here, we hold likewise that the Atlas stock was 'other property' and Bashford, therefore, liable on the deficiency assessment; because the Atlas Powder Company was not 'a party to the reorganization'."

In the *Bashford case* the plaintiff, in an attempt to distinguish *Groman* v. *Commissioner*, *supra*, contended that the Atlas Company should be held to be a party to the reorganization for the reason that it acquired not only a majority of the voting shares of all other classes of stock of the new corporation in the reorganization, but all the stock of the Peerless and Union Companies in direct exchange for such stock of Peerless and Union; that the plaintiff and other stockholders of those companies received certain shares of stock of the Atlas Company; that the Atlas Company, unlike the Glidden Company in the *Groman case*, was a party to all the exchanges, while the new company was a party only to exchanges with Atlas; and that the stockholders of Peerless and Union did not participate in the contract or exchange between Atlas Company and the new company. As to these claimed distinctions, the court said, at page 458: "Any direct ownership by Atlas of Peerless, Black Diamond, and Union was transitory and without real substance; it was part of a plan which contemplated the immediate

transfer of the stock or the assets or both of the three reorganized companies to the new Atlas subsidiary. Hence, under the rule stated, the above distinctions are not of legal significance. The difference in the degree of stock control by the parent company of its subsidiary and the difference in the method or means by which that control was secured are not material. The participation of Atlas in the reorganization of its competitors into a new company which became a subsidiary did not make Atlas 'a party to the reorganization.' The continuity of interest required by the rule is lacking."

The facts which obtained in the *Groman* and *Bashford cases*, *supra*, are not distinguishable from the facts in the case at bar, and we think the rules announced in those cases are controlling here.

In the case of *Samuel A. Neidich* v. *Commissioner of Internal Revenue*, 38 B. T. A. 1178, the United States Board of Tax Appeals held that Neidich, who was a stockholder and the president of the Neidich Process Company of New Jersey (the old company), was taxable upon the gain derived by him through the receipt in 1929 of stock of the Underwood-Elliott-Fisher Company in the transaction here involved, for the reason that the Underwood Company was not a party to the reorganization, and in that opinion we concur. See, also, *Mellon* v. *Commissioner of Internal Revenue*, 36 B. T. A. 977; *Hedden* v. *Commissioner*, 37 B. T. A. 1082.

Plaintiff relies upon *Helvering* v. *Minnesota Tea Company*, 296 U. S. 378, and *Schuh Trading Co. et al.* v. *Commissioner of Internal Revenue*, 95 Fed. (2d) 404. In our opinion the *Minnesota Tea case* is not in point, and the *Schuh Trading Company case* is not in harmony with the decisions in *Groman* v. *Commissioner*, *supra*, and *Helvering* v. *Bashford*, *supra*.

Plaintiff is not entitled to recover and the petition is dismissed.

It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

EDWARD C. KNOUSE v. THE UNITED STATES

[No. 43484. Decided April 3, 1939]

On the Proofs

Government contract; compensation for services as broker.—Where plaintiff, a real estate broker, entered into a contract with the Government to obtain options or settlement figures satisfactory to the Government upon certain parcels of land, such contract providing that the broker's commissions should be due and payable only as title to each parcel was "acquired by the Government," and where, by reason of a court decision that the lands sought to be acquired were not for public use, the project was abandoned by the Government, which did not acquire title, by purchase or otherwise, to any of the parcels in question, it is held that the plaintiff is not entitled to compensation.

Same; impossibility of performance.—The rule that one party to the contract cannot escape liability for payment for services rendered thereunder because of the impossibility of performance on its part is applicable only where the agreement between the parties with reference to payment is not otherwise conditioned.

The Reporter's statement of the case:

Mr. Benjamin L. Tepper for the plaintiff. *Mr. Charles S. Baker* was on the brief.

Mr. Paul A. Sweeney, with whom was *Mr. Acting Assistant Attorney General Paul Campbell*, for the defendant. *Mr. Aaron B. Holman* was on the brief.

The court made special findings of fact as follows, upon a stipulation of the facts and the evidence:

1. June 21, 1934, Harold L. Ickes, Federal Emergency Administrator of Public Works, authorized Horatio B. Hackett to procure a contract for the services of real-estate brokers incident to the acquisition of land for low-cost housing and slum-clearance projects. He also authorized E. K. Burlew of his office to approve such contracts on his behalf. The order of the Secretary of the Interior is in evidence as exhibit 1 and is made a part of this finding by reference.

2. January 15, 1935, plaintiff entered into a contract, No. PW 49027, with the Federal Emergency Administration

of Public Works, which was accepted by Horatio B. Hackett, Director of Housing, and approved by E. K. Burlew for the Administrator. This contract provided that plaintiff would obtain options or settlement figures on certain lots or parcels contained in a proposed housing and slum-clearance project in the Southwest section of Washington, D. C. The scope of the work which plaintiff was to perform and the area comprising the lots on which he was to undertake to secure options and settlement figures are set forth and described in Art. 1 of the contract which is in evidence as exhibit 2 and is made a part of this finding by reference. This paragraph of the contract provided, so far as material here, that such options should be secured by plaintiff on such forms and upon such terms and at such prices as should be satisfactory to and approved by the Government, and, in any event, the plaintiff should endeavor to secure the options at as low a purchase price as possible; that the Government might in its sole discretion at any time determine to acquire all or any part of such area by condemnation, and that in the event the Government should institute condemnation proceedings plaintiff would use his best efforts to secure, on terms advantageous to the Government, amicable settlements with the owners as to the amount of compensation to be paid by the Government for the taking of the project parcels so condemned.

3. Art. 2 of the contract related to the measure of compensation and the condition under which any compensation would become due to plaintiff. This article provided that if plaintiff should obtain options and/or settlements satisfactory to the government on at least 60 per centum of the number of parcels in the area he should be entitled to receive, as compensation for his services thereunder, a sum equal to 2 per centum of the appraised value of each parcel *acquired by the Government:* (1) By purchase under options secured by plaintiff and accepted by the Government; (2) by condemnation where an option satisfactory to the Government for the parcel condemned had been secured by plaintiff and the award for the taking of such parcel did not exceed the option price therefor; and (3) by condemnation where the plaintiff had negotiated the settlement of the amount of the award satisfactory to the Government for

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the taking of such parcel. This article further provided that if plaintiff should secure options and/or settlements satisfactory to the Government covering at least 80 per centum of the parcels in the area, he should be entitled to receive, in addition to the 2 per centum mentioned above, an amount equal to one per centum of the appraised value of all parcels located in the area on which an option or settlement satisfactory to the Government had not been secured by plaintiff.

It was further provided in this article that the Government should be under no obligation to pay plaintiff any compensation whatsoever under the agreement if he failed to secure options and/or settlements satisfactory to the Government covering at least 60 per centum of the parcels in the area, except as provided in paragraphs 5, 8, and 9 of the contract. The term "appraised value" used in the contract had reference to the value of the several parcels as appraised by the appraisers employed by the Government. The concluding portion of Art. 2 of the contract relating to compensation was as follows:

> All commissions payable to the undersigned pursuant to the terms hereof shall be paid by the Government, but *commissions in respect of any parcel shall be due and payable only after title to such parcel shall vest in the Government, and, in the case of condemnation, only after the award shall have been made by the court and the amount thereof paid into court by the Government and the time within which any person might appeal from any order, judgment or decree of the court entered in such condemnation proceedings vesting title to the land in the United States shall have expired.* No payment hereunder shall be made except upon submission by the undersigned of proper vouchers therefor. Such vouchers shall not be submitted more often than twice in each month. [Italics ours.]
>
> The aggregate amount of all compensation to be paid to the undersignd hereunder shall not exceed $12,000.

4. Arts. 3, 4, 5, 6, and 9 do not relate to the matter of compensation claimed herein.

Art. 8 of the contract provides that if the Government for any reason should not be satisfied with the results of the

work performed by plaintiff or with the progress of the work, or if plaintiff should violate or fail properly to comply with or perform in any material respect, as the Government in its absolute discretion might determine, any condition or provision of the contract, the Government should have the right to terminate the employment of plaintiff and/or cancel the contract and have the work therein called for otherwise performed, without prejudice to any rights or remedies of the Government in the premises. And that the Government in any such case should have the benefit of such options and settlements as had been procured up to the time of such termination or cancellation, and with respect to any options exercised by the Government or settlements approved and accepted by it there should be such equitable adjustment of compensation, if any, as might be determined by the Government.

Art. 18 provided that any dispute between the parties should be submitted to the Federal Emergency Administrator of Public Works and that the determination of such administrator should be binding and conclusive for all purposes.

Art. 9 with reference to the right of the Government to cancel the contract provided as follows:

> In addition to the rights of the Government set forth in Paragraph 8 hereof, and irrespective of any default by the undersigned hereunder, the Government may at any time in its discretion, by prior written notice to the undersigned, terminate all or any part of the undersigned's employment hereunder and/or cancel this contract in whole or in part without liability for any services performed hereunder, except to pay to the undersigned the percentages set forth in Paragraph 2 of the appraised value of all parcels of land theretofore or thereafter acquired by the Government, in pursuance of the above-mentioned project, either by purchase by the exercise of options satisfactory to the Government theretofore procured by the undersigned or by condemnation under settlements satisfactory to the Government theretofore negotiated by the undersigned, * * *.

The remaining provisions of the contract, to and including Art. 25, have no important bearing upon the question of

plaintiff's right to compensation and need not be here set forth.

5. In compliance with the terms of the contract plaintiff obtained satisfactory options or settlement figures upon two hundred and twenty lots out of a total of two hundred and forty lots contained in the housing and slum-clearance area described in the contract. The appraised value of the parcels or lots for which plaintiff obtained options or settlement figures was $364,925. The appraised valuation of the remaining parcels in respect of which plaintiff did not obtain satisfactory options or settlement figures was $13,475.

6. Thereupon the Attorney General instituted condemnation proceedings in the United States District Court for the District of Columbia for the purpose of acquiring certain lots or parcels for which no option or settlement figures had been obtained. Several owners of the lots or parcels involved in such proceeding filed demurrers to the petitions for condemnation. The District Court sustained the demurrers, holding that lands sought to be acquired were not for public use. No appeal was prosecuted and the entire project was abandoned by the Government without the acquisition of title to any lot or lots, or parcels, within the specified area.

7. Plaintiff made demand for payment for his services but no amount was paid to him therefor. The Comptroller General, in a decision dated March 18, 1936, held that the Government was not liable for any amount as compensation to plaintiff, either upon the terms of the contract or of *quantum meruit*.

8. If it should be held that plaintiff is entitled under the contract to recover compensation, the amount computed at the percentages specified in Art. 2 would be $7,433.25.

The court decided that the plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff, a real-estate broker, insists that inasmuch as he obtained options or settlement figures satisfactory to the Government upon two hundred and twenty out of two hundred and forty parcels of real estate located in the speci-

fied area he became entitled to demand and receive compensation computed upon the basis and at the percentages specified in the contract in the total amount of $7,433.25; and that the Government is not relieved of responsibility to make such payment because it abandoned the entire project in connection with which the contract was made without the acquisition of title to any of the lots or parcels within the designated area. We are of opinion that this claim cannot be sustained under the terms and conditions of plaintiff's contract with the Government. It is clear from the provisions of Arts. 2 and 9, quoted in findings 3 and 4, that it was understood and agreed between plaintiff and the Government that compensation to plaintiff was to become due and payable at the percentages specified in Art. 2 only as each lot or parcel was "acquired by the Government" by purchase under options secured by plaintiff or by condemnation, and that commissions in respect of any parcel should be due and payable only after title to such parcel should vest in the Government and in the case of condemnations only after the award should have been made by the court and the amount thereof paid into court by the Government and the time within which any person might appeal from any order, judgment, or decree of the court entered in such condemnation proceeding vesting title to the land in the United States had expired. From this it is clear that plaintiff did not become entitled to compensation from the Government since the Government did not acquire title by purchase or otherwise to any lot or parcel of land within the specified area, and it is not important, in view of such contract provisions, that the reason for the abandonment by the Government of the project was due to the decision of the District Court that the lands sought to be acquired were not for public use. Plaintiff's right of compensation was specifically and without exception conditioned upon acquisition of title by the United States. Moreover, under Art. 9, the Government reserved the right to terminate all or any part of plaintiff's employment or to cancel the contract in whole or in part without any liability for any services performed by plaintiff, except as to compensation at the percentages specified in Art. 2 of the appraised value of all parcels of land theretofore or thereafter

acquired by the Government in pursuance of the slum-clearance project.

Plaintiff relies upon the rule that one party to the contract cannot escape liability for payment for services rendered thereunder because of the impossibility of performance on its part. But this rule is applicable only where the agreement between the parties with reference to payment is not otherwise conditioned. The rule has no application here, since plaintiff expressly agreed that no compensation would be due or payable to him for any services rendered under the contract, *unless* the Government acquired the parcels in connection with which he had secured options nor until title thereto had vested in the Government. Neither of the contingencies occurred. The acquisition of the property and the vesting of the title were conditions precedent to plaintiff's right to compensation. For these reasons the plaintiff has no enforceable claim for compensation. *Brimmer* v. *Union Oil Co. of California*, 81 Fed. (2d) 437, 441. The holding of the court in *Amies* v. *Wesnofske*, 255 N. Y 156, 161, is applicable here. In this case the court said:

> * * * The employment of such words as "when," "after," or "as soon as," clearly indicate that a promise is not to be performed except upon a condition. (Williston on Contracts, Vol. 2 § 671.) Promises to pay broker's commissions, for the procurement of sales of real estate, are conditional when expressed to be performable "on the day of passing title" (*Leschziner* v. *Bauman*, 83 N. J. L. 743); "when the sale is completed" (*Sams* v. *Olympia Holding Co.*, 153 Wash. 254); "upon delivery of the deed and payment of the consideration" (*Tarbell* v. *Bomes*, 48 R. I. 86); "at settlement" of the total consideration (*Simons* v. *Meyers*, 284 Penn. St. 3); "when the sale is consummated" (*Alison* v. *Chapman*, 36 Cal. App. 759); "at the date of passing title" (*Baum* v. *Goldblatt*, 81 Penn. Sup. Ct. 233); "at the time of the consummation" of the sale (*Morse* v. *Conley*, 83 N. J. L. 416); if the "deal is completed" (*Pratt* v. *Irwin*, 189 S. W. Rep. 398 [Mo.]); "if the deal now pending" is consummated (*Goodwin* v. *Siemen*, 106 Minn. 368); "only when the seller" has "received her full purchase price" (*Norris* v. *Walsh*, 71 Col. 185).

In the contract here involved, plaintiff assumed the risk of receiving nothing for securing options and settlement

figures in the event the Government should not acquire title to the property. Plaintiff's right to compensation was conditioned upon the occurrence of agreed contingencies, and, in cases such as this, the rule that promise of payment shall be enforceable only upon happening of the specified contingency is no less important than the well-recognized rule that the parties to a contract will be held to their bargain.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WILLIAM BENNETT v. THE UNITED STATES

[No. 43532. Decided April 3, 1939]

On the Proofs

Pay and allowances; effect of Presidential pardon on conduct marks for retirement pay.—Where enlisted man in Navy was retired after thirty years of active service, having received from the President full and unconditional pardon for desertion, it is held that he is entitled to credit for conduct marks during his entire period of service without deduction for period during which he was incarcerated under the sentence of the general court martial.

Same; pardon.—Where an unconditional pardon has been granted, it gives a new credit and capacity, blots out the existing guilt, and makes the victim as innocent as if he had never committed the offense.

The Reporter's statement of the case:

Mr. Fred R. Shields for the plaintiff. *Mr. John W. Gaskins* and *King & King* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. The following is a statement of plaintiff's service in the United States Navy:

Enlisted January 23, 1900.
Honorably discharged March 22, 1904.
Enlisted July 21, 1904.

Deserted July 4, 1907.
Delivered December 5, 1907.
Sentence of conviction for desertion approved December 24, 1907.
Dishonorably discharged March 16, 1908.
Fully and unconditionally pardoned by the President July 22, 1909.
Enlisted November 4, 1909.
Honorably discharged November 3, 1913.
Enlisted November 6, 1913.
Honorably discharged August 6, 1917.
Enlisted August 7, 1917.
Appointed Gunner (T) June 20, 1918.
Appointment as gunner revoked and honorably discharged December 2, 1919.
Enlisted March 19, 1920.
Transferred to Class 1-D, Fleet Naval Reserve, March 31, 1922.
Retired August 1, 1932.

2. During his enlisted service in the Navy plaintiff's maximum possible average of conduct marks to the end of the year 1916 was 10 points, comprised of 5 points for sobriety and 5 for obedience. The average of the marks assigned to him to the end of 1916 was 9.366, which is approximately 94 per cent of the maximum average mark of 10 points.

Plaintiff's maximum possible average of conduct marks during his enlisted service thereafter was 8 points, comprised of 4 points for sobriety and 4 for obedience. The average of the marks assigned to him for this subsequent period was 8 points, which is 100 per cent of the maximum possible average.

The scale of marks was changed from 10 to 8 points at the beginning of the year 1917.

If the scale had not been so reduced the maximum possible average for the entire period of enlisted service would have been 10 points, out of which plaintiff's average of assigned points would have been 9.5, or 95 per cent. No conduct marks were placed on plaintiff's record during the period July 4, 1907, to March 16, 1908. Had he been given one additional mark of zero for that period for obedience, and 5 for sobriety, as against a maximum possible rating

of 10 points, his average as against the 95 per cent described, would have been 9.456 points, or 94.56 per cent.

3. For the period March 1, 1931, to December 31, 1936, plaintiff did not receive the ten per cent increase in pay for men whose average marks in conduct for twenty years or more were not less than 95 per cent of the maximum, under the Act of February 28, 1925, 43 Stat. 1080, 1087.

For that period the amount of such increase of plaintiff's pay would have been $638.34.

The claim is a continuing one.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

This is a claim of a retired enlisted man of the United States Navy for ten percent increase in retainer and retired pay allowed men whose average mark in conduct for twenty years or more of active service is not less than ninety-five percent of the maximum, as provided for under Section 26 of the act of February 28, 1925. 43 Stat. 1080, 1087, 1088.

The facts show that the plaintiff enlisted in the United States Navy on January 23, 1900, and served until July 4, 1907, when he deserted. After apprehension he was brought to trial before a General Court Martial and convicted of the crime of desertion. After serving sentence he was dishonorably discharged from the Navy. On July 22, 1909, he was given a full and unconditional pardon by the President of the United States. Thereafter, on November 4, 1909, he again enlisted in the Navy and served through successive terms of enlistment until March 31, 1922, when he was transferred to the Fleet Naval Reserve. At the time of his transfer he was credited with twenty years' service in the United States Navy. On August 1, 1932, having completed thirty years' service, including active service in the Navy and the time in the Fleet Naval Reserve, he was transferred to the retired list.

Conduct marks were given to plaintiff during his active naval service. However, no conduct marks were actually placed on his record during the period July 4, 1907, to March 16, 1908. The Navy Department, in computing the average

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of his conduct marks during the entire period of his active naval service, used a mark of zero for that period. With the mark of zero for that period, his conduct mark for the entire period of active service would be below ninety-five percent of the maximum one hundred percent. Without this zero mark for that period, plaintiff's average conduct would be ninety-five percent.

The sole question in this case is the effect of the full and unconditional pardon granted by the President for the period during which plaintiff was incarcerated under the sentence of the General Court-Martial. The law is well settled that where an unconditional pardon has been granted it gives a new credit and capacity, blots out the existing guilt, and makes the victim as innocent as if he had never committed the offense. It has the effect of obliterating the offense itself although it can not remove the fact that the sentence has been served, nor does it give the party the right to compensation for the time served. It does, however, rehabilitate with new credit to the extent that he is restored to his former position.

The facts show that the Navy Department did not place a mark against plaintiff's record during the period he served the sentence. It was not until the computation of his conduct record, when he was transferred to the Fleet Naval Reserve, that a zero mark was used at all. This was after the unconditional pardon had been granted to plaintiff and was justified solely on the ground that it was the practice of the Navy Department. This action was without the sanction of law and without taking into consideration the legal effect of an unconditional pardon. To justify it would be to deny "that benign prerogative of mercy which lies in the pardoning power." *Austin* v. *United States*, 155 U. S. 417, 425.

In *Knote* v. *United States*, 95 U. S. 149, 153, the Supreme Court holds:

> A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights. In

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contemplation of law, it so far blots out the offence, that afterwards it can not be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position.

The action of the Navy Department in using the zero mark during the period plaintiff was serving sentence was legally unwarranted and the plaintiff is entitled to have his conduct during the entire period of his service computed without any mark during this period. The record shows that, without a zero mark during this period, plaintiff's average mark for conduct would be ninety-five percent which would entitle him to the ten percent increase in retired pay provided by the act of February 28, 1925, *supra*.

Plaintiff is entitled to recover. This being a continuing claim, entry of judgment will be suspended pending the filing of a report from the General Accounting Office showing the amount due the plaintiff to the date of judgment. It is so ordered.

Williams, *Judge;* Littleton, *Judge;* Green, *Judge;* and Booth, *Chief Justice*, concur.

GEORGE BLISS McCALLUM, EXECUTOR OF THE ESTATE OF ALEXANDER McCALLUM, DECEASED, v. THE UNITED STATES

[No. 43536. Decided April 3, 1939]

On the Proofs

Estate tax; statute of limitation not affected by voluntary payment after period has expired.—Where payment by taxpayer was entirely voluntary and was made after the expiration of the time for filing a claim for refund and at a time when a suit for recovery of any portion of the estate taxes theretofore paid would have been barred, and also at a time when assessment of additional estate taxes would have been barred, it is held that such payment cannot extend the period within which a claim for refund may be filed.

Same.—Statute of limitations cannot be nullified and a new period of limitations created by the voluntary act of the taxpayer.

Same.—Action of Commissioner in issuing a certificate of overassessment and refunding the voluntary payment, without going into the merits of the case or making any determination as to tax liability is held to be immaterial, the Commissioner having no power to waive the statute of limitations.

The Reporter's statement of the case:

Mr. Frank J. Albus for the plaintiff. *Smith, Moore & Lucas* were on the briefs.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

Pursuant to the stipulation of the parties, the court made special findings of fact as follows:

Plaintiff is executor of the estate of Alexander McCallum, who died on October 3, 1919, a resident of Massachusetts. The decedent left a Last Will which was duly admitted to probate by the Register of Probate for Hampshire County, Massachusetts. Plaintiff is the son of the decedent and is a legatee of two-thirds of the residuary estate and, as trustee for his son, of the remaining one-third thereof.

On September 20, 1920, plaintiff filed a Federal estate tax return on behalf of the estate, disclosing a net estate of $586,419.77 and an estate tax liability of $21,685.19,, the final payment of which amount was made on October 20, 1920.

Included in the tax return and listed among the assets of the estate were 100 shares of First National Fire Insurance Company stock, the value of which at decedent's death was reported as nothing.

The tax return was examined by a revenue agent who, in a report dated June 15, 1922, recommended an increase in the value of the gross estate, certain adjustments in respect to allowable deductions, resulting in a net estate of $1,565,-429.44, and a deficiency in tax of $87,666.34. No change was made by the agent in respect to the value of the 100 shares of stock as reported. At the conclusion of the investigation the revenue agent conferred with plaintiff in respect to the estate tax return and the changes recom-

mended by him, and no objection was made by plaintiff thereto.

In his determination of the estate tax liability, the Commissioner of Internal Revenue adopted the report of the revenue agent, and by letter dated September 19, 1922, advised plaintiff that he had determined the gross estate to be $1,678,218.55, allowed deductions in amount of $112,-785.91, resulting in a net estate of $1,565,432.64, a tax liability of $109,351.92, and a deficiency in tax of $87,666.73.

Plaintiff paid this deficiency on October 27, 1922.

The aforesaid 100 shares of stock were sold by plaintiff on February 11, 1924, for $325.00.

On June 4, 1932, plaintiff wrote the Collector of Internal Revenue that the 100 shares of stock had been sold for $325, and enclosed a check for $39, stating that same was "in payment of the Federal Estate Tax on the above amount, $325.00." The payment was voluntarily made by plaintiff for the purpose of attempting to extend the time for filing a claim for refund.

On December 14, 1934, plaintiff filed a claim in which he asked for the refund of $17,546.52 on the ground that he was entitled to additional deductions aggregating $162,-313.66, consisting of a judgment paid by him in 1929 in a suit pending against the decedent at the time of his death, expenses in connection therewith, miscellaneous administration expenses, and Federal and State Income Taxes paid by plaintiff on income of the decedent prior to his death. None of the items or matters set forth in the claim was included in the estate tax return, nor had they ever been called to the attention of the Commissioner of Internal Revenue, or asserted or claimed by plaintiff prior to the filing of the claim on December 14, 1934.

On March 30, 1935, the Commissioner of Internal Revenue issued a certificate of overassessment to plaintiff in the amount of $39, representing the above mentioned payment, and refunded same to plaintiff, stating in said certificate that "This certificate of overassessment is issued in view of Section 607 of the Revenue Act of 1928." In issuing the certificate of overassessment, the Commissioner of Internal Revenue did not go into the merits of the case or otherwise determine, or redetermine, the tax liability.

Opinion of the Court

On June 14, 1935, the Commissioner of Internal Revenue formally rejected the claim for refund filed December 14, 1934, and plaintiff sued thereon within two years thereafter.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

Alexander McCallum, a resident of the State of Massachusetts, died October 3, 1919, and the plaintiff is the duly qualified executor of his estate. On September 20, 1920, plaintiff filed a Federal estate tax return on behalf of the estate of the decedent showing in detail the amount of Federal estate tax. The amount of tax so found to be due was paid by the plaintiff on October 20, 1920.

Included in the tax return and reported among the assets of the estate were 100 shares of First National Fire Insurance Company stock, the value of which at decedent's death was reported as nothing. The tax return was examined by a revenue agent who, in a report dated June 15, 1922, recommended certain adjustments which resulted in a deficiency in tax of $87,666.34 but no change was made with respect to the value of the 100 shares of stock as reported. The revenue agent conferred with the plaintiff in regard to the changes recommended and no objection was made by plaintiff thereto. The Commissioner of Internal Revenue adopted the report of the revenue agent fixing the tax liability and deficiency in tax. This deficiency was paid by plaintiff on October 27, 1922.

The 100 shares of stock above referred to were sold by plaintiff on February 11, 1924, for $325, and June 4, 1932, the plaintiff wrote the collector of internal revenue reporting the sale thereof and enclosed a check for $39 stating that the same was "in payment of the Federal Estate Tax on the above amount, $325.00." The payment was voluntarily made by the plaintiff for the purpose of attempting to extend the time for filing a claim for refund.

On December 14, 1934, plaintiff filed a claim in which he asked for the refund of $17,546.52 on the ground that he was entitled to additional deductions aggregating $162,-313.66, consisting of a judgment paid by him in 1929 in a

suit pending against the decedent at the time of his death, expenses in connection therewith, miscellaneous administration expenses, and Federal and State Income Taxes paid by plaintiff on income of the decedent prior to his death. None of the items or matters set forth in the claim was included in the estate tax return, nor had they ever been called to the attention of the Commissioner of Internal Revenue, or asserted or claimed by plaintiff prior to the filing of the claim on December 14, 1934.

On March 30, 1935, the Commissioner of Internal Revenue issued a certificate of overassessment to plaintiff in the amount of $39, representing the above mentioned payment, and refunded same to plaintiff, stating in said certificate that "This certificate of overassessment is issued in view of Section 607 of the Revenue Act of 1928." (45 Stat. 791, 874.) In issuing the certificate of overassessment, the Commissioner of Internal Revenue did not go into the merits of the case or otherwise determine, or redetermine, the tax liability.

On June 14, 1935, the Commissioner of Internal Revenue formally rejected the claim for refund filed December 14, 1934, and on March 30, 1937, the plaintiff began this suit thereon.

It will be observed that the payment upon which the suit is based was entirely voluntary, that it was made after the expiration of the time for filing a claim for refund and at a time when a suit for the recovery of any portion of the estate taxes theretofore paid would have been barred, and also at a time when the Commissioner of Internal Revenue was barred from assessing additional estate taxes. The issue in the case is whether a payment so made, under the facts stated above, can nullify the bar of the statute which had been in existence for a number of years and extend the period within which a claim for refund may be filed. Counsel for plaintiff call attention to the previous decisions of this court in which it was held that the statutory period for refunding estate taxes wrongfully collected was to be determined from the time when the whole of the tax was paid, and that the recovery upon the refund was not confined to the portion of the tax paid within the period of limitations. These cases and similar cases upon which other

courts have passed involve an altogether different question than is now before us and were based upon altogether different facts. In all of these cases the claims sued upon were timely filed after the payment of taxes which had been timely assessed by the Commissioner of Internal Revenue upon audit of the estate tax returns and these facts were necessary to support the decisions which were made in favor of the taxpayers. In the case before us, the payment upon which plaintiff bases its case was made after plaintiff's tax had not only been fully settled and agreed upon but after the statute of limitations had run against both parties as to instituting further proceedings in the matter. The payment was made in an attempt to extend the time for filing a claim for refund. If the contention of the plaintiff should be sustained, then, after the statute went into effect, it could be nullified and a new period of limitations created by the voluntary act of the taxpayer. Nor would it matter how long a period had transpired since the limitation went into force, which in the instant case was many years.

When a question arises as to the proper construction of a statute in respect to a matter with reference to which the law is not specific, the rule is that the courts should consider what the intention of the legislative body was in enacting the statute and also whether the construction necessary to sustain the cause of action would be a reasonable one.

It is too plain to need either discussion or argument to show that the construction which plaintiff seeks to apply to the statute was not intended by Congress. Congress never intended to authorize the taxpayer for an indefinite period after the statute of limitations had otherwise expired, to extend the time during which he might file a claim for refund by making an additional payment of taxes for which at the time of payment he was not liable. Under such a construction the taxpayer's right to reopen the case would never be ended. Its practical effect would be to permit the taxpayer to abrogate the statute of limitations whenever he chose to make an additional payment after his case had been completely closed. To say that such a situation would be unreasonable is, we think, to put it mildly. It would be grossly unfair to the Government.

The Commissioner issued a certificate of overassessment to plaintiff for the $39 paid on June 4, 1932, and refunded the same to the plaintiff "in view of Section 607 of the Revenue Act of 1928" without going into the merits of the case or making any determination as to tax liability. This, we think, is immaterial as the Commissioner had no power to waive the statute of limitations. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528.

"The tax" and the whole tax was paid and completely settled in 1922 and the parties had so agreed. No further assessments or claims were presented by the Government and none could be collected by the Government after the period of limitations had expired. Nothing more was due from the taxpayer, consequently the taxpayer had not only paid "the tax" but all the tax and the whole of his tax. There was nothing more to be paid thereon and the plaintiff could not extend the time of recovery of any taxes alleged to have been theretofore wrongfully paid by voluntarily presenting to the Government a further sum as additional taxes upon an item which in the original settlement had been determined to be not taxable.

The plaintiff's petition must be dismissed and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

GENERAL BRONZE CORPORATION v. THE UNITED STATES

[No. 44398. Decided April 3, 1939]

On Demurrer

Government contract; claim not under the act of June 25, 1938.—Where bid was submitted July 11, 1933, and accepted by letter dated August 14, 1933, and received August 17, 1933, it is held that claim for additional costs by reason of the National Industrial Recovery Act does not come within the provisions of the Act of June 25, 1938.

Same.—Execution of formal contract at later date does not affect the fact that there was a meeting of the minds of contracting parties when letter of acceptance was sent.

The Reporter's statement of the case:

Mr. N. Otis Rockwood for the plaintiff. *Folger, Rockwood, Wormser & Kemp* were on the briefs.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. Paris Houston* was on the brief.

WHALEY, *Judge*, delivered the opinion of the court:

The issue presented in this case arises on a demurrer by the defendant that the allegations of the petition show that the plaintiff has stated no cause of action within the jurisdiction of the court.

The petition alleges that the George Rogers Clark Sesquicentennial Commission is a duly constituted administrative agency or establishment of the Government with authority to enter into contracts with respect to the George Rogers Clark Memorial; that in 1933 the Congress of the United States passed the National Industrial Recovery Act which became a law on June 16, 1933 (48 Stat. 195); that on July 11, 1933, plaintiff, in pursuance of an invitation for bids, dated June 29, 1933, submitted to the George Rogers Clark Sesquicentennial Commission a bid for the fabrication and erection of the bronze and glass ceiling sash in the George Rogers Clark Memorial in the city of Vincennes, Indiana, in the sum of $13,390.00; and at the time the bid was submitted plaintiff deposited a certified check with the Commission for $1,600, as required by the invitation to bid. Plaintiff further alleges that the bid so submitted was based upon the costs of labor and material before and prior to June 16, 1933; and that, upon information and belief, its offer was accepted prior to August 10, 1933.

In its seventh allegation, however, plaintiff alleges that on August 17, 1933, it received from the Commission a notice in writing dated August 14, 1933, that its bid had been accepted, and that by letter dated August 19, 1933, plaintiff advised the Commission that, because of the National Industrial Recovery Act having been enacted, the costs to plaintiff had been and would be increased, and endeavored to with-

draw its bid as made to the defendant and stated that the price would be increased fifteen percent.

Plaintiff further alleges that the Commission advised it that the bid could not be withdrawn or the prices increased and that, for the failure to comply, the deposit made by it would be forfeited, but that the Commission would endeavor to reimburse plaintiff for such additional cost; that on August 30, 1933, plaintiff was advised to proceed with the work as called for by its accepted bid; that plaintiff relied upon the assurance of the Commission for reimbursement of the additional costs for labor and material occasioned by the enactment of the National Industrial Recovery Act, and in order to avoid the loss of its deposit, and under duress and compulsion, entered upon the performance of the contract; and thereafter on November 13, 1933, while engaged in the work, plaintiff and defendant executed a contract, number GRC–30, which enveloped the work contemplated.

The petition shows the performance of the work and its completion at an increased cost of $1,214.72; plaintiff's filing of a formal claim within the time required with the Comptroller General, and the rejection of the claim on the ground that the contract was entered into during the period provided for in the act of June 25, 1938, 52 Stat. 1197, which provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and enter judgments against the United States upon the claims of contractors, including completing sureties and all subcontractors and materialmen performing work or furnishing material to the contractor or another subcontractor, whose contracts were entered into on or before August 10, 1933, for increased costs incurred as a result of the enactment of the National Industrial Recovery Act: *Provided*, That (except as to claims for increased costs incurred between June 16, 1933, and August 10, 1933) this section shall apply only to such contractors, including completing sureties and all subcontractors and materialmen, whose claims were presented within the limitation period defined in section 4 of the Act of June 16, 1934 (41 U. S. C. Sec. 28–33).

Opinion of the Court

The sole question in this case arises as to the time when the bid of the plaintiff was accepted by the Commission.

The act of June 25, 1938, provides for only those contracts entered into before August 10, 1933, for increased cost incurred as a result of the enactment of the National Industrial Recovery Act. The facts show that plaintiff made its bid on July 11, 1933, which was 25 days after the passage of the National Industrial Recovery Act and the Commission accepted the bid in writing by letter on the 14th of August, 1933, which was four days after the date fixed in the act as the limit for which recovery could be had. It is true that the plaintiff alleges on information and belief that the bid was accepted prior to the limit fixed in the act but there is an allegation in the petition that plaintiff received a letter on August 17, 1933, which was dated August 14th, in which the Commission accepted the offer of the plaintiff to its advertisement for bids. It will be assumed that, when a letter is dated on the 14th, it was mailed on that day or at a subsequent date, but, at any rate, it was received by the plaintiff on the 17th. It was at the time the letter was posted that the minds of the parties met and the contract was entered into. The mere fact that a formal contract was executed later on does not alter the fact that the plaintiff's and defendant's minds met as to the terms of the contract at the time of the acceptance by the Commission by letter of the 14th of August.

In *Burton* v. *United States*, 202 U. S. 344, 384, 385, the Supreme Court holds:

> It is to be taken as settled law, both in this country and in England, in cases of contracts between parties distant from each other, but communicating in modes recognized in commercial business, that when an offer is made by one person to another, the minds of the parties meet and a contract is to be deemed concluded, when the offer is acepted in reasonable time, either by telegram duly sent in the ordinary way, or by letter duly posted to the proposer, provided either be done before the offer is withdrawn, to the knowledge of or upon notice to the other party.

It will be seen from the petition that, although the National Industrial Recovery Act was passed in June 1933,

and the plaintiff submitted its bid on July 11th, 1933, no attempt was made by it to withdraw its bid or to ask for an increase because of the passage of the National Industrial Recovery Act until the 19th of August, 2 days after the receipt by plaintiff of a letter from the Commission accepting its bid as of the 14th of August, 1933.

We are of the opinion that the minds having met when the Commission accepted, in writing, the offer of the plaintiff, which was 4 days after the limit set in the act (August 10, 1933), and this fact showing on the face of the petition the plaintiff is not entitled to bring this cause of action. Plaintiff's remedy is with the Congress.

The demurrer is sustained and the petition dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

F. T. CHAFFIN, RECEIVER OF THE SHERMAN OIL MILL, v. THE UNITED STATES

[No. 17606, Congressional. Decided April 3, 1939]

On the Proofs

Contract for cotton linters; title of receiver to claim.—Upon the evidence adduced, it is held that the plaintiff, receiver, has no title to the claim which is the subject of the instant suit.

Same; order of receivership.—Order of State court, appointing a receiver, is held not binding upon the Government, which was not a party to the receivership proceeding.

The Reporter's statement of the case:

Mr. George R. Shields and *Benet, Shand & McGowan* for the plaintiff.

Messrs. Frank J. Keating and *William W. Scott*, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

Reporter's Statement of the Case

On January 26, 1937, the court sustained a motion to substitute F. T. Chaffin, Receiver of The Sherman Oil Mill, as party plaintiff in this case and referred the case to a Commissioner "to hear such evidence as may be presented by either party tending to show how and in what manner this receiver obtained title or right to institute an action to recover on the claim in suit, and particularly as to whether The Sherman Oil Mill, a corporation, was a successor to Sherman Oil Mill, and whether the former acquired the property of the latter by operation of law or through some transaction in the nature of an assignment or otherwise, and if by assignment or purchase, the precise nature of the transaction."

The Commissioner having complied with this order and made his report, the Court, pursuant thereto, made the following special findings of fact:

1. Sherman Oil Mill was a corporation organized in 1911, under the laws of the State of Texas. It continued as a corporation of the State of Texas until it was dissolved on December 29, 1920. During 1918 and 1919 and until its dissolution, it was engaged in the manufacture of products derivative from cotton seed.

2. On September 5, 1918, Sherman Oil Mill entered into seller's contract of sale effective, however, as of August 1, 1918, designated purchase contract No. 3024, with the United States, acting by DuPont American Industries, Inc., its agent, whereby Sherman Oil Mill agreed to sell to the United States 2,800 bales, or approximately 1,400,000 pounds, of average clean mill run linters for the price of $0.0467 per pound. Deliveries of the linters were to be F. O. B. cars point of production Sherman, Texas, and shipments were to be made during the period from September 1918 to and including January 1919.

3. Interstate Cotton Oil Refining Company was a corporation organized under the laws of the State of Delaware. On December 30, 1920, it purchased, for cash, all the real property in Sherman, Texas, of Sherman Oil Mill except one gin and operated the former property of Sherman Oil Mill until August 29, 1922.

This sale did not include any transfer or purchase of the books and accounts, choses in action, or the cotton linter claim, which is the subject matter of this suit.

4. The Sherman Oil Mill was a corporation organized on August 29, 1922, under the laws of the State of Texas. On October 14, 1922, it purchased the real estate of Interstate Cotton Oil Refining Company for the sum of $100,000, said real estate being the same property Interstate Cotton Oil Refining Company had previously purchased from Sherman Oil Mill.

This sale did not include any transfer or purchase of the books and accounts, choses in action, or the cotton linter claim, which is the subject of this suit.

When Sherman Oil Mill sold its real estate to Interstate Cotton Oil Refining Company, its shares of stock were surrendered for cash or stock in the Interstate Cotton Oil Refining Company. When the Interstate Cotton Oil Refining Company sold the above-mentioned real estate to The Sherman Oil Mill, it received in payment the sum of $100,000 in cash.

5. On May 21, 1936, the District Court of Grayson County, Fifteenth Judicial District, State of Texas, appointed F. T. Chaffin receiver of The Sherman Oil Mill. The order of the district court appointing the receiver reads in part as follows:

> * * * the plaintiffs are entitled to have a receiver appointed of the following property of the defendant The Sherman Oil Mill, a corporation, to wit: A certain claim which arose originally in favor of the defendant Sherman Oil Mill and was purchased by The Sherman Oil Mill * * *.

The petition, praying for the appointment of the receiver, reads in part as follows:

> That this claim is the property of The Sherman Oil Mill though the original claim was in favor of and belonged to Sherman Oil Mill, it having been acquired by The Sherman Oil Mill in taking over the properties of Sherman Oil Mill.

On January 26, 1937, the Court of Claims sustained a motion to substitute F. T. Chaffin, receiver of The Sherman Oil Mill, as party plaintiff in the instant case.

6. During the period January 1 to July 31, 1919, Sherman Oil Mill crushed a total of 734.58 tons of seed, which at $6.77 per ton of seed crushed would amount to $4,973.10. Sherman Oil Mill incurred, in connection with the linters produced from this seed, storage charges in the sum of $204.80 and handling charges amounting to $65.20.

7. Sherman Oil Mill received on account of the linters produced from such seed the following amounts:

For linters sold to the United States	$2,738.21
For linters sold to others	536.31
Total receipts	3,274.52

By reducing its cut of linters after January 1, 1919, Sherman Oil Mill realized an additional hull production to the extent of 25.71 tons, which at $13.50 per ton amounts to $347.08.

8. Should The Sherman Oil Mill be entitled to recover on the cotton linter claim of Sherman Oil Mill, the parties join in the following as a correct statement of the account between Sherman Oil Mill and the United States:

Debit items against defendant

734.58 tons of seed at $6.77 per ton	$4,973.10	
Storage charges	204.80	
Handling charges	65.20	
Total debits		$5,243.10

Credit items allowable to defendant

Linters sold to the United States	$2,738.21	
Linters sold to others	536.31	
Additional hull credit	347.08	
Total credits		$3,621.60
Balance		1,621.50

9. This case was submitted to the court by the parties thereto on the record made therein, including the evidence presented to the Commissioner.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The claim involved in this case originally accrued to Sherman Oil Mill. The receiver of The Sherman Oil Mill now claims to be entitled to recover on the claim under a contract of sale made by Sherman Oil Mill with The Sherman Oil Mill, but the evidence does not sustain this claim. The findings show that this sale did not include any choses in action or the cotton linter claim which is the subject matter of this suit. Sherman Oil Mill and The Sherman Oil Mill are two different corporations. It appears that F. T. Chaffin has been appointed receiver of The Sherman Oil Mill, and the order of the court appointing him receiver referred to the property involved in the receivership as a claim which originally arose in favor of Sherman Oil Mill purchased by The Sherman Oil Mill. The order is not definite with reference to the nature of the claim but, assuming that it refers to the one involved in the case now before this court, it is evident under the facts recited above that the receiver of The Sherman Oil Mill has no title thereto. The Texas court could appoint a receiver of the property of The Sherman Oil Mill but the recitals in its order in any event would not be binding upon the defendant which was not a party to the receivership proceeding.

Our conclusion is that the plaintiff Chaffin, as receiver of The Sherman Oil Mill, has failed to show any right of recovery against the defendant and it is therefore ordered that his petition be dismissed.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

CASES DECIDED

IN

THE COURT OF CLAIMS

December 5, 1938 to April 17, 1939

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 43592. February 6, 1939

M. E. Blatt Company.

Refund of income tax; improvements made by lessee. Opinion 87 C. Cls. 413.

On mandate of the Supreme Court reversing the decision of the Court of Claims (305 U. S. 267), the Court entered judgment for the plaintiff in the sum of $211.61 with interest thereon from September 5, 1934, as provided by law.

No. K-533. February 6, 1939

Lamm Lumber Company.

Contract for purchase of timber on Indian Reservation; tribal contract; liability of the Government. Opinion 86 C. Cls. 171.

Dismissed on mandate of the Supreme Court reversing the decision of the Court of Claims. 87 C. Cls. 758; 305 U. S. 415.

No. L-391. February 6, 1939

Forest Lumber Company.

Contract for purchase of timber on Indian Reservation; tribal contract; liability of the Government. Opinion 86 C. Cls. 188.

Dismissed on mandate of the Supreme Court reversing the decision of the Court of Claims. 87 C. Cls. 758; 305 U. S. 415.

No. M-109. FEBRUARY 6, 1939

Algoma Lumber Company.

Contract for purchase of timber on Indian Reservation; tribal contract; liability of the Government. Opinion 86 C. Cls. 226.

Dismissed on mandate of the Supreme Court reversing the decision of the Court of Claims. 87 C. Cls. 758; 305 U. S. 415.

No. 43136. MARCH 6, 1939

Robert H. Montgomery.

Income tax; deduction for additional State tax; ascertainment of loss; gift to son; depreciation on property acquired by gift. In accordance with its decision of May 2, 1938 (87 C. Cls. 218) and upon a stipulation by parties as to the amount due under said decision, the court rendered judgment for the plaintiff in the sum of $2,760.11, with interest thereon from March 13, 1935, according to law.

PAY AND ALLOWANCES

No. 43408. JANUARY 9, 1939

James C. R. Schwenk.

Rental allowances, Army officer. Findings of fact, conclusion of law and judgment for $404.60, on authority of *O'Mohundro* v. *United States*, 84 C. Cls. 362.

No. 43647. FEBRUARY 6, 1939

Richard W. Gibson.

Rental allowances, officer of the Air Corps, U. S. A. Findings of fact, conclusion of law, and judgment for $300.90, on authority of *O'Mohundro* v. *United States*, 84 C. Cls. 362.

No. 43588. MAY 1, 1939

James A. Greenwald, Jr.

Navy pay; effective date of retirement. In accordance with its opinion of January 9, 1939, in the case, *ante*, p. 264, the Court rendered judgment for the plaintiff in the sum of $925.57, on report from the General Accounting Office.

In the following cases involving claims to recover rental allowances while serving in China, judgments were rendered as indicated, on authority of *Montague* v. *United States*, 79 C. Cls. 624, and *Bartholomew* v. *United States*, 84 C. Cls. 631.

JANUARY 9, 1939

M-264. J. P. Juhan, U. S. M. C., $1,422.34.
M-290. Francis J. McQuillan, U. S. M. C., $1,040.00.
44035. Norman Hussa, U. S. Navy, $1,034.80.
44036. Robert L. McKee, U. S. Navy, $967.00.

MARCH 6, 1939

M-243. Thelma B. Owens, Administratrix of the Estate of H. R. Bourne, deceased, $917.33.

COTTON LINTER CASES

In the following cases involving claims for damages for breach of World War contracts for cotton linters, judgments against the Government were rendered as indicated, pursuant to the stipulation filed in the case of *Rose City Cotton Mill* v. *United States*, Congressional No. 17341, and all other pending cotton linter cases as per list attached to said stipulation.

FEBRUARY 6, 1939

No. 17376, Congressional. Globe Cotton Oil Mills, to the use of Globe Grain & Milling Company, $8,011.17.
No. 17387, Congressional. Bowden Oil & Fertilizer Company, to the use of Carrie J. Lovvorn, administratrix of the estate of J. L. Lovvorn, deceased, $379.25.
No. 17393, Congressional. Patrick Oil Company, to the use of Mabel Patrick Campbell, J. H. Patrick, W. C. Patrick, Annie Patrick Wood, Dan H. Patrick, Florence Bell Anderson, and Mary Alice Bell Cutrer, sole heirs of H. A. Patrick, deceased, $1,260.06.
No. 17407, Congressional. R. Fleming Johnson, receiver of Central Oil Company, $10,045.91.
No. 17439, Congressional. Vidalia Oil & Ice Company, $1,697.80.
No. 17446, Congressional. Friars Point Oil Mill & Manufacturing Company, $2,708.58.
No. 17564, Congressional. R. G. Conn, receiver of Producers Cotton Products Association and Ennis Cotton Oil & Manufacturing Company, $1,741.37.

No. 17583, Congressional. Jacksonville Cotton Oil Company, to the use of W. G. Crumpler, liquidating agent of Jacksonville Oil Mill, $829.10.

No. 17584, Congressional. Jefferson Oil Company, to the use of Marshall Cotton Oil Company, $1,434.20.

No. 17616, Congressional. Clay Hight, receiver of Tyler Cotton Oil Company, $3,473.28.

APRIL 3, 1939

No. 17575, Congressional. Jack Sparks, Receiver of Planters Oil Company (Hearne, Texas, plant), $2,542.88.

No. 17607, Congressional. Shiner Oil Mill & Manufacturing Company, $412.04.

No. 17610, Congressional. Jack Sparks, Receiver of Planters Oil Company (Taylor, Texas, plant), $1,093.75.

No. 43703. FEBRUARY 6, 1939.

Levi L. Beery.

Rental and subsistence allowance; Army officer with dependent mother. In accordance with its decision of November 14, 1938 (87 C. Cls. 557), and upon a report from the General Accounting Office showing the amount due under said decision, the Court rendered judgment for the plaintiff in the sum of $5,126.46.

CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON DECEMBER 5, 1938

42467. Packard Motor Car Co. of Boston.
42844. Packard Motor Car Co. of Boston.
43417. American National Assurance Co.
43418. West Virginia Pulp and Paper Company.
43593. Girard Trust Company, Trustee.
43788. Thomas Henry Foster.

ON JANUARY 9, 1939

42971. Springfield National Bank.
43453. L. H. Jenkins, Inc.
43458. Emily O. Harris.
43590. J. Wirt Willis.
43619. Albert H. Inman, Administrator.
43620. Margaret B. Ordway et al., Executors.
43712. John H. Bennett.

ON FEBRUARY 6, 1939

42502. W. H. Belk.
43416. W. H. Belk, Executor of Estate of J. M. Belk.
43454. Roland H. Parker.
43832. Ruth Mehl, Admx. of John W. Mehl.

ON MARCH 6, 1939

H–456. B. H. Jacob et al., Trustees.
H–459. Jesse Oppenheimer et al., Trustees.
H–499. Westinghouse Union Battery Co.
H–504. C. J. Phillips et al., Trustees.
H–505. American Storage Battery Co.
H–540. Harrison Smith Company.
J–189. Witherbee Storage Battery Co.
43533. Breger, Einhorn & Glasser.
43544. William B. Read.
43710. E. Irving Hanson.
43617. Walter D. Lane.
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ABSTRACT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

THE SIOUX TRIBE OF INDIANS v. THE UNITED STATES

[No. C–531–(5)]

[86 C. Cls. 299; 306 U. S. 642]

Indian claims; obligation of Government under treaty limited to reasonable time. Petition dismissed March 7, 1938; motion for new trial overruled December 5, 1938.

Petition for writ of certiorari *denied* by the Supreme Court February 27, 1939.

DUQUESNE CLUB v. THE UNITED STATES

[Nos. 43180 and 43263]

[87 C. Cls. 483; 306 U. S. 649]

Excise tax; social club; initiation fee and membership dues. Petitions dismissed July 5, 1938.

Petitions for writ of certiorari *denied* by the Supreme Court March 13, 1939.

COOS (OR KOWES) BAY, LOWER UMPQUA (OR KALAWATSET), AND SIUSLAW INDIAN TRIBES v. THE UNITED STATES

[No. K–345]

[87 C. Cls. 143; 306 U. S. 653]

Indian claims; evidence. Petition dismissed May 2, 1938.

Petition for writ of certiorari *denied* by the Supreme Court March 27, 1939.

SIDNEY WEINBURG v. THE UNITED STATES

[No. 42788]

[87 C. Cls. 497; 306 U. S. 661]

Income tax; account stated; time limitation upon refund; decided November 14, 1938; petition dismissed.

Petition for writ of certiorari *denied* by the Supreme Court April 17, 1939.

FERDINAND A. STRAUS ET AL., EXECUTORS, v. THE UNITED STATES

[No. 42787]

[87 C. Cls. 506; 306 U. S. 661]

Income tax; account stated; time limitation upon refund; decided November 14, 1938; petition dismissed.

Petition for writ of certiorari *denied* by the Supreme Court April 17, 1939.

H. B. NELSON CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 43457]

[87 C. Cls. 375; 306 U. S. 661]

Government contract; error in specifications; change order, etc.; decided May 31, 1938; judgment for plaintiff.

Petition for writ of certiorari *denied* by the Supreme Court April 17, 1939.

CHIPPEWA INDIANS OF MINNESOTA v. THE UNITED STATES

[No. H-155. Decided November 14, 1938; supplemental opinion January 9, 1939, *ante*, p. 1]

[*Affirmed* April 17, 1939. 307 U. S. 1]

On appeal from judgment of the Court of Claims dismissing the petition of plaintiffs.

The judgment of the Court was *affirmed* April 17, 1939, in an opinion as follows:

This is an appeal from a judgment of the Court of Claims dismissing a suit brought to compel restoration of trust funds alleged to have been diverted by the appellee.

In 1926 Congress granted permission for the bringing of the suit, which was instituted April 13, 1927. In order to permit the claim to be presented in its present form the permissive act was amended in 1934. The appellants then filed an amended petition to which the appellee responded by a general traverse. The right of appeal from the judgment of the Court of Claims is conferred by Joint Resolution of June 22, 1936.

The suit is for the enforcement of equitable claims arising under or growing out of the Act of January 14, 1889. The appellants' theory is that the Act constituted an offer on the part of Congress for an agreement with the bands of Chippewas located in Minnesota, whereby, if these bands would cede the Indian title to their reservations (which they did), the United States would sell the timber thereon and open the agricultural lands to settlement, and hold the proceeds of the timber and the lands in trust, to expend the income for purposes specified in the statute, including payment of a portion of such income to the Indians, and to distribute the principal at the expiration of fifty years after allotments had been completed to all the members of the various bands on specified reservations. The circumstances leading to the adoption of the Act and its relevant sections appear in earlier decisions of this Court and need not here be repeated (*Wilbur v. United States*, 281 U. S. 206, 209, 210; *Chippewa Indians* v. *United States*, 301 U. S. 358, 362).

The appellants assert that, by the Act of 1889, Congress abdicated its plenary power of administration of the Chippewas' property as tribal property, recognized that the reservations of the respective bands were not tribal property, and agreed to hold the proceeds of the ceded lands in strict and conventional trust for classes of individual Indians in accordance with the program outlined in the Act.

In this view the living Chippewas are beneficiaries of the income of the fund during the fifty-year period, and individual Chippewa Indians who may be living at the expiration of the period, as a class, are remaindermen. It is urged that, as Congress has, from time to time,

reimbursed the Treasury for expenditures for the benefit of the Chippewa Indians of Minnesota out of the fund, and has authorized other direct expenditures from the fund for the benefit of the Indians in ways not authorized by the Act, the United States has been guilty of a diversion of trust funds and that the appellants, as the representatives of the remaindermen, are entitled, on plain principles of equity, to demand restoration of the diverted sums to the corpus.

If, as the Court of Claims has found, the Act of 1889, and the cessions made pursuant to it, did not create a technical trust, we are relieved from considering many of the contentions pressed by the appellants in that court and here. We are of opinion that the Court of Claims was right in its decision that no such trust was created.

The original tribal status of the Chippewas is described in *Wilbur* v. *United States*, 281 U. S. 206, 208, and *Chippewa Indians* v. *United States*, 301 U. S. 358, 360. It is unnecessary now to restate what was there said on the subject.

It is true that, prior to the adoption of the Act of 1889, the tribe had been broken up into numerous bands, some of which held Indian title to tracts in the State of Minnesota. The Act refers to these collectively as "The Chippewas in the State of Minnesota." Whether or not the tribal relation had been dissolved prior to its adoption, the Act contemplates future dealings with the Indians upon a tribal basis. It exhibits a purpose gradually to emancipate the Indians and to bring about a status comparable to that of citizens of the United States. But it is plain that, in the interim, Congress did not intend to surrender its guardianship over the Indians or treat them otherwise than as tribal Indians.

This is evidenced by a series of acts, the first of which was adopted nineteen months after the Act of 1889, which are inconsistent with the view that the Congress considered the Indians as emancipated or intended to enter into a binding contract with them as individuals.[1] Many of these statutes refer to the Chippewas of Minnesota as a tribe. Moreover, an examination of the Act of 1889 discloses that it is not cast in the form of an agree-

[1] Aug. 19, 1890, c. 807, 26 Stat. 336, 357. Between 1890 and 1926 Congress appropriated, either from the fund created under the Act of 1889 or from public funds reimbursable therefrom, a total of $5,105,059 for the civilization and support of the Chippewas (Findings 9, 10, 15). During the period 1889 to 1934 Congress authorized the expenditure of public funds totaling $5,065,878 for the use and benefit of the Chippewas without any provision for reimbursement (Finding 20).

ment; and we may not assume that Congress abandoned its guardianship of the tribe or the bands and entered into a formal trust agreement with the Indians, in the absence of a clear expression of that intent.

It is not contended that the expenditures made from the fund, or reimbursed from it, were not for the benefit of the Indians or were not such as properly might be made for their education and civilization, the purposes stated in the Act of 1889.

We hold that the Act did not tie the hands of Congress so that it could not depart from the plan envisaged therein, in the use of the tribal property for the benefit of its Indian wards.

The judgment of the Court of Claims is affirmed.

Mr. JUSTICE ROBERTS delivered the opinion of the Court.

EMIL OLSSON v. THE UNITED STATES

[No. B–154]

[87 C. Cls. 642; 307 U. S. —]

Patent; validity, infringement, utility; use; measure of compensation. Judgment for plaintiff May 31, 1938; findings of fact amended and plaintiff's motion for new trial overruled December 5, 1938.

Petition for writ of certiorari *denied* by the Supreme Court April 24, 1939.



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CONTRACTS.

I. Where plans, specifications, and statements are alleged to have led to the belief that the Government would construct a railroad track, adjacent to proposed location of hangars to be built by plaintiff, it is held that the evidence fails to show that any contract or agreement was made by the Government to construct such a railroad track, and in the absence of any agreement there can be no recovery for cost and expense incurred by reason of the defendant having failed to construct such railway. *Sobel*, 149.

II. Where soil conditions, unknown when the contract was made, rendered it necessary to change the character of the foundations, which delayed the work, it is held that this was not such a change as was contemplated by the contract, and plaintiff is entitled to recover for incidental costs and damages resulting from the delay so occasioned, although the contract price was increased to cover the increased cost of construction of the foundations and the time limit for completion of the contract was extended. *Id.*

III. Where the contract made provisions for the erection of an additional hangar, at the option of the defendant, it is held that the plaintiff cannot recover for the delay caused by the erection of such additional hangar. *Id.*

IV. Where contract called for "hydrostatic" test of the steam heating system, and it was provided that the defendant should furnish the steam for such test, but no steam was in fact furnished, and a test was made with compressed air, it is held that the plaintiff is entitled to recover for cost of repairing the system when defects developed. *Id.*

CONTRACTS—Continued.

V. Where contract for construction of a lock in the Kanawha River called for a test of certain valves to ascertain if said valves would lower and raise the gates of the lock, without specifying the character of such test, and where plaintiff successfully made a mechanical test, and was then required, at extra expense, to make an oil test, it is held that plaintiff is entitled to recover. *General Contracting Corporation*, 214.

VI. Where contract provided that steel castings should be within a given percentage of the theoretical "weight as calculated from the drawings," it is held that a different method of calculating the weight, or a deduction from the weight calculated in accordance with the method prescribed in the contract, is not allowable; even if a different method may be in accord with good engineering practice, it is the contract that governs. *Id.*

VII. Contract provisions are not susceptible to modification or change when they expressly state what may be done thereunder and the method and procedure for making changes; where the record does not sustain a contention that contractor could not possibly observe the provisions of the specifications, and where a choice of method was permitted and the contractor adopted the more expensive way, contractor may not recover. *Id.*

VIII. Where the record does not support a holding that a claimed misrepresentation of conditions actually misled the contractor, it is held that there is no basis for recovery. *Id.*

IX. Where a contractor made no investigation of its own as to subsurface conditions, and there is no positive and convincing proof of misrepresentation by the defendant as to said conditions, it is held that the plaintiff cannot recover. *Id.*

X. It is held that under the facts of the case the contract itself determined the rights of the parties and the General Accounting Office was without jurisdiction. *McShain Co.* v. *United States*, 83 C. Cls. 405 and authorities therein cited. *Rumsey*, 254.

XI. Where contractor, in excavating for Government building, encountered a large quantity of reinforced concrete, not visible from the usual inspection, which it was necessary to remove, it is held that this involved extra work for which contractor is entitled to extra pay in accordance with the decision of the contracting officer. *John McShain, Inc.*, 284.

CONTRACTS—Continued.

XII. Where there existed an admitted difference between the specifications and the work called for under the plans, involving the character of backfill over drains, and the contracting officer reached a conclusion by construing the specifications and drawing to exact a backfill of gravel by implication, and the contractor performed this extra work under protest, it is held that the contractor is entitled to recover for the added cost. *Id.*

XIII. Where contractor failed to appeal from the decision of the contracting officer, which was his right under the contract, it is held that he cannot now recover. *Id.*

XIV. Where contractor could not meet the requirements of the specifications within the time limit fixed for performance because the Government did not possess title to sufficient lands to enable it to be done, causing the contractor to incur a loss it was not under obligation to incur, it is held that the contractor is entitled to recover. *Gillen*, 347.

XV. Failure on the part of the Government to make available to a contractor the site upon which the work is to be performed, if it occasions delay in performance and causes damages to the contractor, entitles him to recover his loss. *Id.*

XVI. Determination of a claim by department officials is not binding upon the Court but is a fact, a proceeding in the course of the administration of the transaction, to be given such weight as the Court thinks it is entitled to receive. *Id.*

XVII. It cannot be inferred from the record that the Government intended to make the performance of the work extremely costly when a more inexpensive way was available. *Id.*

XVIII. Where completion of work on remodeling Veterans' Hospital was delayed due to the failure of Government to vacate building and make it available, and where the delay resulted in extra costs due to the weather, it is held that contractor was not liable for liquidated damages and is entitled to recover for such extra costs. *MacDonald*, 473.

XIX. Where a contractor's delay is caused by the other party to the contract, he cannot be held responsible for not completing the work within the specified time. *Id.*

XX. Where a contractor is prevented from executing his contract according to its terms, he is relieved from the obligation of the contract and from paying liquidated damages. *Id.*

CONTRACTS—Continued.

XXI. Where plaintiff entered into a contract with the Government, through the Civil Works Administration, in response to invitation for bids, to supply and to make available certain quantities of clay, from which plaintiff, at his expense removed the overburden of sand; and where the Government, after having called for, loaded and hauled away from plaintiff's clay pit a portion of the total amount which the Government had agreed to take and to pay for, cancelled the contract, it is held that this constituted a breach of the contract for which the plaintiff is entitled to recover. *Tyree*, 510.

XXII. Where plaintiff had performed his part of the contract by removing the overburden from the clay, and making the clay available for removal by defendant, the measure of plaintiff's damages upon breach of the contract is the difference between the unpaid contract price and the fair value of the clay which the defendant refused to take. *Id.*

XXIII. Where it is shown by the evidence that the contractor had prosecuted the work with diligence so as to insure its completion within the time allowed by the contract and that the entire fault for the delay was due to the failure of the Government to comply with its part of the contract, it is held that cancellation of the contract by the Government was arbitrary and capricious, and the plaintiff is entitled to recover. *Largura*, 531.

XXIV. The Government can be required to make compensation to a contractor for damages which he has actually sustained by defendant's default in its performance of its undertaking to him. *Id.*

XXV. While under the authorities plaintiff would have been entitled to whatever profit it could prove it would have made under the contract, it is held that in the instant case the proof does not show a profit would have been made. *Id.*

XXVI. Where construction of the buildings called for by the contract was completed on May 25, 1929, and accepted by the defendant on that date, it is held that the instant suit was not barred by the statute of limitation of six years when the original petition was filed June 27, 1936; since decision on questions arising under the contract was not made, and the amount due plaintiff under the contract was not determined or paid, nor was a final voucher prepared and submitted to plaintiff for execution, as provided in the contract, earlier than July 9, 1930; voucher was transmitted to plaintiff in August 1930, and final payment was made in June 1936. *Austin Engineering*, 559.

CONTRACTS—Continued.

XXVII. The rule that all claims under a contract for the purpose of bringing suit accrue when the work called for by the contract is completed and accepted by the Government is not a rule of universal application where it appears from the contract provisions and the existing facts that the amount to which the contractor may be entitled under the contract may be due and payable at a certain time depending upon certain determinations, decisions, or action after the actual completion of the work. *Id.*

XXVIII. The statute of limitation does not begin to run until the right of action "has accrued in a shape to be effectually enforced." *United States* v. *Wirts*, 303 U. S. 414, 416. *Id.*

XXIX. The statute of limitation does not begin to run until the time when payment becomes due under the contract. *Id.*

XXX. A cause of action or a claim under a contract does not accrue piecemeal, and where a contract contains a provision with reference to the time when the contract shall be regarded as finally concluded, the statute of limitation with reference to bringing suit does not begin to run until that date. *Id.*

XXXI. Where claims of plaintiff for additional fees, arising out of change orders calling for extra work, were submitted to the Supervising Architect of the Treasury Department, it is held that said claims were settled by the decision of the Supervising Architect in accordance with the provisions of the contract. *Fourchy*, 564.

XXXII. The question of whether there was an agreement, as claimed, was within the scope of the matter submitted to the Supervising Architect. *Id.*

XXXIII. Where it is stated in the contract that architect's fee shall not be due "until the entire scheme has the approval of the Secretary of the Treasury and the Attorney General," it is held that under the terms of the contract the approval of the Attorney General, who was not a party to the contract, was not necessary in order to enable the architect to recover payment for his services. *Id.*

XXXIV. If it had been intended that one not a party to the contract must manifest his approval, it would have been so stated in the contract. *Id.*

XXXV. While provisions of the contract with reference to arbitration are indefinite, it is held that the intention of the parties to the contract was that if there was failure to agree concerning compensation for work done under

CONTRACTS—Continued.

change orders, the compensation of the plaintiff therefor was to be fixed by the Supervising Architect of the Treasury, whose decision should be binding upon both of the parties. *Id.*

XXXVI. Where plaintiff, a real estate broker, entered into a contract with the Government to obtain options or settlement figures satisfactory to the Government upon certain parcels of land, such contract providing that the broker's commissions should be due and payable only as title to each parcel was "acquired by the Government," and where, by reason of a court decision that the lands sought to be acquired were not for public use, the project was abandoned by the Government, which did not acquire title, by purchase or otherwise, to any of the parcels in question, it is held that the plaintiff is not entitled to compensation. *Knouse*, 595.

XXXVII. The rule that one party to the contract cannot escape liability for payment for services rendered thereunder because of the impossibility of performance on its part is applicable only where the agreement between the parties with reference to payment is not otherwise conditioned. *Id.*

XXXVIII. Where bid was submitted July 11, 1933, and accepted by letter dated August 14, 1933, and received August 17, 1933, it is held that claim for additional costs by reason of the National Industrial Recovery Act does not come within the provisions of the Act of June 25, 1938. *General Bronze*, 612.

XXXIX. Execution of formal contract at later date does not affect the fact that there was a meeting of the minds of contracting parties when letter of acceptance was sent. *Id.*

COTTON LINTERS.

I. Upon the evidence adduced, it is held that the plaintiff, receiver, has no title to the claim which is the subject of the instant suit. *Sherman Oil Mill*, 616.

II. Order of State court, appointing a receiver, is held not binding upon the Government, which was not a party to the receivership proceeding. *Id.*

DAMAGES, MEASURE OF.
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I. Where shipments of coal were delivered by common carrier to the Naval Fuel Depot, and the common carrier collected from the owners of the coal, or their agents, freight charges on the basis of the export rates, on the presumption that the coal was to be used on voyages or to be transshipped, there can be no recovery from the Government for the difference between the export rate and the domestic rate when it transpires that a quantity of the coal was not transshipped but was diverted to local Government activities. *Virginian Railway Company*, 142.

II. Where the Government advertised for bids for coal f. o. b. the Navy Fuel Depot, and on shipments of coal delivered in accordance with these bids the freight charges were paid by the owners of the coal, or by their representatives, the Government was not the consignee, actually or by construction of law. *Id.*

III. The party who pays the freight charges and receives delivery is the party responsible for payment of the lawful freight rate. *Id.*

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INDIAN CLAIMS.

I. In enacting the Act of January 14, 1889, providing for the disposition of the lands held by the Chippewa Indians of Minnesota, it is held that Congress clearly intended to put into effect the Government's prevailing Indian policy, which was to secure the dissolution of the various Indian Bands and Tribes, allot to them lands in severalty, dispose of surplus lands for their benefit and otherwise seek to civilize the Indians themselves. *Chippewa Indians*, p. 1.

II. Where Congress provided, in the Act of 1889, that tribal funds accruing from the sale of surplus lands, should be conserved for the benefit of the Indians, it was not the intent of Congress to establish a trust fund, which would be beyond the control of Congress itself. *Id.*

III. The fact that the Chippewa Indians of Minnesota as a Tribe were divided into bands does not destroy the identity of the Tribe as such or alter the character of the title by which their lands are held. *Id.*

IV. Where, under the Act of 1889, there was a voluntary merger of all the tribal lands, participated in by all the Bands of the Chippewa Tribe, and consummated by cessions of all the Chippewa Bands, the funds resulting from the sale of said lands were tribal funds. *Id.*

V. The fact that Congress in the Act of 1889 did not exert to the limit the power and authority which Congress indisputably possessed over tribal funds does not sustain the contention that the plenary power of Congress over tribal funds was surrendered; the inclusion of a referendum clause in the Act did not change the established relationship of the government and the Indians; the mutual assent of the interested parties to the enactment of the Act did not create a contract. *Id.*

VI. In the enactment of statutes similar to the Act of 1889, Congress did not intend to surrender its plenary power if subsequent conditions justified further legislation, for the benefit of the Indians, provided such subsequent legislation did not take from the Indians vested rights. *Id.*

INDIAN CLAIMS—Continued.

VII. There is held to be no foundation for the contention that under an Act of Congress providing for the settlement of Indian tribal estates a succeeding Congress is powerless to alter a former Act, when the succeeding Congress deems it essential to exercise its plenary power over tribal funds for the good of the tribe. *Id.*

VIII. It is held that the policy of Congress in providing that expenditures made by the Government for the benefit of the Indians, including education and drainage, should be reimbursed from tribal funds is an exercise of the discretion and authority of Congress in which the courts may not intervene. *Id.*

IX. It is held that the Act of 1889 did not accomplish an "immediate emancipation" of the plaintiff Indians; that the Act did not dissolve the relationship of guardian and ward; and that it did not place the Government in the position of being absolutely unable to administer their tribal affairs. *Id.*

X. If Congress determined to utilize the existing fund for a generation of tribal Indians who in their judgment needed it to ward off the hardships of life, and who were really the creators of the fund, it was a matter for Congress to determine and not the courts. *Id.*

XI. Congress possesses the exclusive and plenary authority to deal with tribal Indian lands and funds as in its wisdom it deems just; this is a matter within the exclusive jurisdiction of Congress and if the legislation does not impair vested rights or appropriate property for a public purpose the courts are absolutely without jurisdiction. *Id.*

XII. The jurisdictional Act does not create rights and consequent liabilities; nor does it by its terms recognize existing rights under the Act of 1889. *Mille Lac Band of Chippewa Indians* v. *The United States* (229 U. S. 498, 520) cited. *Id.*

XIII. Where it is contended that the President of the United States, through his Secretary of War, in 1818 made a promise to the Cherokee Indians of a perpetual outlet west, as an inducement to them to move from the east to the west of the Mississippi River, it is held that although these promises had been held out to the Indians by the Secretary of War, nevertheless Congress did not grant an outlet in any treaty until 1828 and in this treaty the outlet is fixed as far as the sovereignty of the United States and their right of soil extend; and at that time the right of soil and sovereignty of the United States did not extend beyond the

INDIAN CLAIMS—Continued.

100th degree of west longitude as fixed in the treaty with Spain in 1821. *Eastern or Emigrant Cherokees*, 452.

XIV. Treaties entered into between nations are political and not judicial questions and courts can not declare a treaty fraudulent or non-effective. *Id.*

XV. The courts have to consider treaties as valid and binding. *Id.*

XVI. At the time the patent in question was granted, the limit of the western boundary of the United States was fixed at 100 degrees of west longitude and the United States did not possess any sovereignty or right of soil west of that degree of longitude. *Id.*

XVII. The outlet mentioned in the patent was that contained in the Indian Territory, and after the agreement of 1891, which was subsequently ratified in 1893, the Cherokee Indians conveyed for a valid and valuable consideration all their right, title, and interest to this outlet; therefore, from that date they have not possessed an outlet for which claim can be made against the United States. *Id.*

XVIII. It is held that plaintiffs have no legal or equitable claim arising or growing out of any treaty or agreement or act of Congress which entitles them to compensation from the United States for which they have not been paid in full. *Id.*

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See Contracts, XXXVIII, XXXIX. Taxes, XXVI, XXVII.

NAVY PAY.

I. Where an officer in the Navy was retired under the provisions of U. S. Code, Title 34, Section 417 (R. S. 1453) the effective date of retirement is the date contained in the recommendation of the Secretary of the Navy which the President approved, and not the date upon which the President affixed his signature. *Greenwald*, 264.

II. The President has the power to fix the date of retirement, under the Statutes. *Id.*

OVERPAYMENT.
See Taxes XXXVIII.

OWNERSHIP.
See Patent Cases Procedure II.

PATENTS.

I. From the prior art and the knowledge set forth in the findings of fact it is held that the claims of plaintiff are not directed to novel and patentable subject matter and are therefore not valid. *Myers*, 107.

II. The question of continuity of invention as applied to applications for patents filed upon different dates to entitle one to priority is one of fact. *Id.*

III. Where no witness testified to that effect, and there is no direct testimony that the method in question involved only mechanical skill, but the evidence as a whole makes this conclusion manifest, direct testimony by an expert is not required in order to enable the court to reach a conclusion. *Martin*, 179.

IV. Upon the evidence it is found that in a landing wheel for an aeroplane, it was on March 12, 1918, the date of plaintiff's application which matured into patent #1432771, issued to plaintiff on October 24, 1922, not new to have:

An outer rim and tire rotatable upon an inner part not rotatable;

A nonrotatable axle mounted in a guide slot so as to provide for a substantially vertical relative movement between the two nonrotatable parts;

The vertical movement resisted by elastic bands wrapped around portions of the two nonrotatable parts in such a manner as to permit a yielding under heavy loads or shocks;

Rubber for the elastic material in the bands;

The shock-absorbing element placed within the side planes of the wheel, and while a shock absorber using elastic bands had not been so located, such an opera-

PATENTS—Continued.

tion would naturally be suggested to those skilled in the art who wished to minimize the wind resistance of the wheel. *Id.*

V. Prior to the issuance of plaintiff's patent, in suit, there were two kinds of shock absorbers well known; one used springs located within the plane of the wheel, and the other rubber bands on the same general plan as that described in plaintiff's patent but located outside of the plane of the wheel; scientific journalists discussed the location of the shock absorbers within the planes of the wheel without reference to the type used, and this could be done with either type by those skilled in the art. *Id.*

VI. Claims 1 and 2 of the patent of plaintiff are held to be invalid because of complete anticipation, and claims 3 and 4 for want of patentable novelty or invention over the prior practical, patented, and published art. *Id.*

VII. It is held in the instant case the facts show that if the claims of the patent are so construed as to read upon the alleged infringement structures, they are clearly anticipated by the prior art. *Hamacek*, 369.

VIII. The patent is held to be void through lack of proper description. *Id.*

PATENT CASES PROCEDURE.

I. Where motion for bill of particulars seeks an admission on the part of the defendant rather than an amplification of defendant's pleadings, it is not allowable. *Martin*, 249.

II. Whether the plaintiff has or has not made any agreement, assignment, or exclusive license of the patent in suit to any person, firm, or corporation is a matter that comes definitely within his own knowledge; ownership is one of the items of proof involved in the presentation of plaintiff's case. *Id.*

III. It is not the function of a bill of particulars to require a party to disclose evidence or names of witnesses. *Id.*

IV. Information as to employment of plaintiff at a particular time is within the knowledge of plaintiff, and not properly included in a motion for a bill of particulars. *Id.*

V. Dates of conception and reduction to practice are matters solely within knowledge of plaintiff. *Id.*

VI. The Court suggests that time and expense would be saved if plaintiff would give notice to the defendant, either in response to a motion for a bill of particulars, or in some other form binding upon the plaintiff,

PATENT CASES PROCEDURE—Continued.

setting forth the dates of conception and reduction to practice it intends to rely upon, and the application of the claims in issue as applied to the alleged infringing structures. *Id.*

VII. Before a defendant can be called upon to furnish a bill of particulars the essential facts relied upon by the plaintiff to establish his cause of action must be pleaded; in the instant case it is held that the plaintiff is in error in seeking a bill of particulars asking the defendant to divulge the prior art relied upon in order to facilitate disposition of the case, without setting forth in plaintiff's petition the dates of conception and reduction to practice. *Id.*

PAY AND ALLOWANCES.

I. Where an officer of the Medical Corps, U. S. Army, assigned to duty with the Governor of the Panama Canal, as physician in the Health Department, was reimbursed the amount he was required to pay for rental of quarters owned by and controlled by the Panama Canal, he is not entitled under the Act of April 9, 1935, to recover an additional amount as rental allowances. *Porter*, 172.

II. Where enlisted man in the United States Army, having served as commissioned officer in the World War, was retired, under the provisions of Section 8 of the Act of June 6, 1924, on the retired pay of a warrant officer, it is held that his pay comes under the provisions of Section 212 (a) of the Act of June 30, 1932 (the "Economy Act") when such retired pay, combined with the annual rate of compensation of a civilian position under the United States Government, held by him, exceeds $3,000 per annum. *Hayes*, 309.

III. An Army officer, who, by reason of an airplane accident, was physically unfit for duty as an airplane pilot, but was assigned to duty as an observer and participated as such in aerial flights, is entitled to the 50 percent additional flying pay provided by statute. *Holland*, 341.

IV. "Nonpiloting duty" is not the equivalent of "nonflying duty." *Id.*

V. Assignment to duty determines an officer's pay status. *Id.*

VI. Where enlisted man in Navy was retired after thirty years of active service, having received from the President full and unconditional pardon for desertion, it is held that he is entitled to credit for conduct marks

PAY AND ALLOWANCES—Continued.
during his entire period of service without deduction for period during which he was incarcerated under the sentence of the general court-martial. *Bennett*, 602.
VII. Where an unconditional pardon has been granted, it gives a new credit and capacity, blots out the existing guilt, and makes the victim as innocent as if he had never committed the offense. *Id.*
See also Navy Pay I, II.
PERFORMANCE, IMPOSSIBILITY OF.
See Contracts XXXVII.
POLICY OF GOVERNMENT.
See Indian Claims I.
PRESIDENTIAL PARDON.
See Pay and Allowances VI, VII.
PROFITS AND LOSSES.
See Taxes XXIX.
PROPER DESCRIPTION, LACK OF.
See Patents VII, VIII.
PROTEST AS TO DISALLOWANCES.
See Taxes II.
RECEIVER, TITLE OF.
See Cotton Linters I.
RECEIVERSHIP, ORDER OF.
See Cotton Linters II.
RENTAL ALLOWANCE.
See Pay and Allowances I.
REORGANIZATION, TRANSFER OF STOCK IN.
See Taxes LXXII, LXXIII.
RESERVE FUNDS.
See Taxes LII.
RETIRED PAY.
See Pay and Allowances II.
RETIREMENT, EFFECTIVE DATE OF.
See Navy Pay I, II.
SHOCK ABSORBERS.
See Patents V.
STATUTE OF LIMITATIONS.
See Contracts XXVI, XXVII, XXVIII, XXIX; Taxes LXVIII, LXIX, LXX, LXXI, LXXIV, LXXV, LXXVI.
STATUTORY EXEMPTIONS.
See Taxes LXII, LXIII.
STATUTORY LIMITATIONS.
See Taxes III.
STIPULATION SET ASIDE.
See Taxes VI, VII.
SUPERVISING ARCHITECT, APPROVAL BY.
See Contracts XXXV.

TAXES.

I. Where taxpayer on December 12, 1931, filed claim for refund of the entire amount of income tax for 1928, which amount was paid in four installments—March 20, June 17, September 16, and December 16, 1929—it is held that under Section 322 of the Revenue Act of 1928, the claim for refund was properly held by the Commissioner to have been timely filed, within the two-year period, only as to the last installment. *Mohawk Rubber*, 50.

II. Where taxpayer on December 10, 1930, filed a document protesting against additional assessments for 1927 and 1928 and disallowances contained in revenue agent's report, and alleging errors in said report, it is held that this document was entirely lacking in the essential elements of a claim for credit, which, while it need not be made in any exact form, nevertheless must make known taxpayer's contention for refund or credit in such a manner that the Commissioner would be apprised of taxpayer's desire. *Id.*

III. The granting of refunds and credits is confined to the limits set by Congress, and specific statutory provisions must be adhered to, no matter how great the equity may be. *Bull.* v. *U. S.*, 295 U. S. 247, and *Dunigan* v. *U. S.*, 87 C. Cls. 404, distinguished. *Id.*

IV. The doctrine laid down in *Swift and Company* v. *United States* (69 C. Cls. 171) is reaffirmed, that in computing the net income of a consolidated group of corporations "the separate corporations are the taxpayers, and the affiliated group is merely a tax-computing unit, not a taxable unit." *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 328 cited. *Federal Export*, 60.

V. Since losses, if deducted at all, must be deducted from the net income of the corporation sustaining the loss, there can be no deduction from the consolidated income of a loss sustained by a company which for the particular year in question has no income. *Id.*

VI. Without regard to the rule in other courts, and in cases where the Government is not the defendant, it is held that the Court of Claims has the right, in order to prevent an injustice being done the Government, to set aside a stipulation which has been inadvertently entered into by one of the Government's attorneys even though the stipulation involves a matter of law; the Court having previously held in *Giddings* v. *United States* (29 C. Cls. 12, 15) that where a case was submitted on stipulation either party might withdraw it at any time before a decision is announced, and in the

TAXES—Continued.

case of *Jones and Laughlins* v. *United States* (42 C. Cls. 178) that the Court of Claims had authority to set aside a stipulation involving a mistake of law in order to protect the Government. *Id.*

VII. When a claimant seeks to avail himself of a stipulation in writing by a representative of the Government he takes it subject to a motion of defendant's counsel to set the agreement aside. *Id.*

VIII. Where two affiliated corporations acted as separate entities, kept separate books and made agreements with each other, and in accordance therewith the corporate taxpayers made tax returns to the Government, it is held that each corporation is a separate taxpayer, and allocation of income on any other basis is denied. *Id.*

IX. Where two subsidiaries each showed a loss for the year 1918, these losses could not under the decision in the *Swift* case be taken as a deduction by either of said corporations in that year, and where advances were made to the said two corporations in 1919 by the parent company (plaintiff), but the said two companies continued to exist after 1919, and, so far as the evidence goes, the loans from the parent company to the two subsidiaries were not liquidated until later years, there is nothing in the record from which a loss to the plaintiff (parent corporation) on these advances in 1919 can be determined; and change in allocation of losses must be refused. *Id.*

X. Where one subsidiary in 1919 advanced money to another, which was then operating at a loss, and the evidence shows that the second subsidiary was sold in 1926 or 1927, but there is nothing in the record from which it can be determined when, if ever, a loss on this transaction was sustained by the first subsidiary, a reallocation cannot be made as asked by plaintiff. *Id.*

XI. There is no authority in cases cited for holding that a loss occasioned by an advance is deductible in the year in which the advancement was made when there is no evidence showing that the loss was determined in that year. *Atlantic City Co.* v. *Commissioner*, 288 U. S. 152; *Burnet* v. *Aluminum Goods Co.*, 287 U. S. 544, 548; *Autocar Co.* v. *Commissioner*, 84 Fed. (2d) 772, distinguished. *Id.*

XII. Where claim for refund filed May 9, 1930, was specific in confining its application to the labor content of certain materials included in the inventory as of December 31, 1918, and there was nothing in the claim which would call the attention of the court to a claim for revaluation

TAXES—Continued.

of materials in the inventory generally, it is held that under the rule laid down by the Supreme Court in *Andrews* v. *United States* (302 U. S. 517), the plaintiff was not entitled to have considered an amendment filed March 30, 1933, after the period of limitations, seeking a refund on account of other and unrelated items. *Winchester*, 89.

XIII. Where claim was made for refund for failure to include as part of inventory, as items subject to be valued under the statute and regulations at "cost or market, whichever is lower," (a) small production tools and materials used in their manufacture and (b) supply and other miscellaneous items, consisting largely of factory stationery, it is held that since none of these articles were on hand for sale and did not become part of the finished product which plaintiff was manufacturing for sale, the cost of these articles was an item of expense and not a part of the inventory. *Id.*

XIV. The omission of any allowance on account of the labor element in these items was not an error. *Id.*

XV. Where plaintiff corporation, engaged in the business of growing and in packing and marketing for itself and others, fruits and other crops, as an incident of such business made a cash advance to another corporation, also engaged in growing fruits and other crops, and the two corporations entered into a mortgage-marketing contract, securing to the mortgagee (plaintiff) exclusive right to furnish the supplies essential for packing the crops and the right to market the same on a commission basis; and where the mortgagor corporation defaulted on principal and interest on bonds issued under an indenture securing a mortgage on all its assets; and where the plaintiff purchased such assets at foreclosure sale, paying cash therefor; and where plaintiff entered upon its books the assets so purchased at a cost equivalent to the price paid at foreclosure sale plus the amount of indebtedness due from the defaulting corporation, and also made entries on its books balancing and charging off plaintiff's account with the corporation, it is held that plaintiff is entitled to deduct from its gross income the unpaid debt as a loss incurred in the year in which the transaction took place. *Pacific Fruit Exchange*, 300.

XVI. Legal precedents establish the rule that no particular form of charge-off is required; it is sufficient if the book entry discloses that the debt is worthless and has not been paid. *Id.*

TAXES—Continued.

XVII. A mortgage-marketing contract is an indenture of dual character, and is intended to secure to the mortgagee the exclusive right to furnish the supplies essential for packing the crops and the right to market the same on a commission basis. The contract creates a lien in favor of the mortgagee upon the realty of the mortgagor as well as upon his growing and harvested crops. *Id.*

XVIII. It is held that the capital stock tax is an adjunct of the excess-profits tax, and its provisions were framed with a view to the use of what is termed the "declared value" as the basis of the excess-profits tax; the capital stock tax should not be considered as if that tax were alone and segregated from the excess-profits tax but the two taxes should be considered together and their validity must depend upon the results of their joint operation and the joint effect upon the taxpayer. *Allied Agents*, 315.

XIX. Congress had the right to prescribe the basis for the two taxes, and this plan was made self-adjusting; there is nothing arbitrary in permitting the taxpayer to make his election as to the valuation of the capital stock he would declare. *Id.*

XX. The fact that the taxpayer is given by the statute the right to do some act which will affect the amount of its tax in one of its phases, or cancel it entirely, will not by itself and alone render the statute imposing the tax invalid. *Id.*

XXI. It is impossible to adjust many taxes so that they will apply with uniformity to each and every taxpayer; taxation is not an exact science and discrimination cannot always be avoided, and since no absolute rule can be laid down prescribing the degree of uniformity required, if it is reasonable, considering the general nature of the tax which is applied, the statute will not be invalid. *Id.*

XXII. There is nothing arbitrary in permitting the taxpayer to elect the amount it would declare as the valuation of its capital stock and precluding either party thereafter from making a change in the amount elected; there is nothing discriminatory in these provisions. *Id.*

XXIII. There is no delegation of legislative power in the provision which permits the taxpayer to fix the amount of the tax, since nothing that the taxpayer does or can do affects anyone but itself; the corporation performs no legislative duty in making the election or choice of the amount which it will declare, and Congress

TAXES—Continued.

is not exceeding its power in granting to the taxpayer the right of election as to the amount to be declared unless it results in so gross and arbitrary a discrimination between the taxpayers as to invalidate the tax. *Id.*

XXIV. In the instant case it is held that the taxpayer cannot under any reasonable hypothesis absolutely determine the amount of its taxes which will depend upon its profits as ascertained at the end of the year; in attempting to lessen its taxes it may actually increase the amount thereof and all the taxpayers have an opportunity to obtain a fair and reasonable rate for the tax which is self-adjusting except in very unusual or extraordinary circumstances. *Id.*

XXV. The contention that the capital stock tax of 1935, being computed on the declared value for the previous year is based upon mere supposition or guess, and therefore has no proper foundation, is plausible and might be given weight if the actual value of the stock were sought instead of an amount upon which the taxpayer states he is willing to be taxed in connection with the excess-profits tax; the statute, however, does not require the actual value to be stated, nor does it permit either party to amend the return to show the actual value; it merely requires that the plaintiff shall elect the value which it will declare. *Id.*

XXVI. Title I of the National Industrial Recovery Act was held invalid in the *Schechter* case, but the decision has no application to Title II. *Id.*

XXVII. It is held that the provisions of subsection (c) of Section 201 of Title II do not show that the tax was levied for a specific purpose and not for general revenue; the Congress had the power under the Constitution to make the revenue produced available for certain purposes; if the funds were made available for specific purposes by another statute, the authority of Congress so to provide would not be questioned, and the result is the same when such a provision is inserted in the taxing act itself. *U. S.* v. *Butler*, 297 U. S. 1, distinguished. *Id.*

XXVIII. The funds raised by the tax are not to be used for any unconstitutional purpose; the two taxes were both levied for revenue. *Id.*

XXIX. The plaintiff seeks to recover an alleged overpayment of income taxes for the year 1929 on the ground that the brokerage partnership of which he was a member had an agreement with an individual to operate in certain

TAXES—Continued.

securities on joint accounts and providing that profits from such operations should be equally divided but that losses should be borne entirely by the partnership, but it is held that the evidence sustains the conclusion that the losses as well as the profits were to be shared equally between the partnership and the individual. *Mayer*, 329.

XXX. Where plaintiff in his income tax return for 1926 included in his taxable income an amount which was in reality the income of another; and where the money to pay the tax on this income erroneously reported as plaintiff's was furnished to plaintiff by another, it is held that plaintiff, having filed a timely claim for refund of the overpayment for 1926, has an equitable right to recover. *Cunningham*, 333.

XXXI. Where the corporations which paid to plaintiff the money with which to pay the excess tax were denied the right to claim such payments as deductions, it is held that such denial is not a bar to plaintiff's right to recover the excess tax paid; plaintiff was the taxpayer within the meaning of the statute. *Id.*

XXXII. A letter from the Commissioner, referring to revenue agent's report recommending overassessment, does not constitute an account stated. *Id.*

XXXIII. An account stated cannot be predicated upon implication and conjecture; it must be a positive and definite statement of a balance due. *Id.*

XXXIV. Where plaintiff and her husband, citizens of the State of California, had in 1927 entered into an agreement with reference to existing property rights between them; and where plaintiff and her husband filed separate income tax returns for 1930, on the basis of the said agreement; and where the Commissioner of Internal Revenue, after examining these returns, disregarded the agreement and determined that the income of plaintiff and her husband for Federal tax purposes should be allocated according to the community property laws of California; and accordingly an overassessment was computed in favor of the plaintiff and a deficiency found against her husband; and in 1933 the Bureau of Internal Revenue, pursuant to such determination, advised plaintiff to file a claim for refund; and such claim was duly filed by plaintiff, and a certificate of overassessment in favor of the plaintiff was prepared but was subsequently cancelled by the Com missioner without having been forwarded to the collector or delivered to the plaintiff; and on May 14, 1934, the Bureau wrote to plaintiff that her return

TAXES—Continued.

for 1930 was under consideration, and that on the basis of information on file, it was the opinion of the Bureau that the return should be adjusted in accordance with recommendations made in revenue agent's report, but that action was deferred pending decision of a similar case in the United States Circuit Court of Appeals, it is held that the evidence fails to disclose the necessary elements of an account stated. *Marshall*, 393.

XXXV. An "account stated" must be or contain a statement of the balance of the account, that is, a balance must be struck and an account rendered to the other party for that balance. *Id.*

XXXVI. The Commissioner's action in making a preliminary examination of the account, his erroneous conclusion as to the amount of taxes due, and his direction to file a refund claim, taken singly or considered together, did not bind the defendant to allow and pay plaintiff's claim. *Id.*

XXXVII. Under the decision of the United States Circuit Court of Appeals in the case of *Helvering, Commissioner* v. *Hickman*, 70 Fed. (2d) 985, in which the precise issue raised herein by plaintiff was presented, it is held that the final action of the Commissioner in rejecting the claim for refund was correct; "by the law of California, as construed by her courts, the earnings of the wife never became community property if the husband and wife have agreed that they shall be and remain her separate property." *Id.*

XXXVIII. Under the rule laid down in *Lewis* v. *Reynolds*, 284 U. S. 281, the ultimate question is whether the taxpayer has overpaid her tax. *Id.*

XXXIX. Where plaintiff deducted from its gross income as investment expenses all amounts charged in its investment department representing direct and actual investment expenses wholly incurred and paid in the investment department, and, in addition, the amounts on account of officers' and cashiers' salaries apportioned to and included in investment expenses in accordance with a resolution of its board of directors; and where the actual investment expenses exceeded one-fourth of 1 per centum of the mean of the book value of plaintiff's invested assets at the beginning and end of the taxable year, it is held that the Commissioner properly excluded as a part of the deduction that part of the salaries of officers and cashiers apportioned to and included in investment expenses (Revenue Act of 1928, Section 203 (a) (5)). *New World Life*, 405.

TAXES—Continued.

XL. That "general expenses" may be reasonably susceptible of apportionment does not take them out of the class of general expenses within the meaning of the proviso of Section 203 (a) (5). *Id.*

XLI. Legislative history of the provisions of the Revenue Acts relating to the taxation of incomes of life insurance companies reveals that since only the income from the investment department was to be taxed, Congress intended that only the actual investment expenses should be allowed as a deduction when a deduction in excess of the one-fourth of 1 per centum of the mean of invested assets was permitted. *Id.*

XLII. Congress may condition, limit, or deny deductions from gross income in order to arrive at the net income that it chooses to tax. *Id.*

XLIII. Since premium income was not being taxed, and the untaxed premiums contained amounts for payment of the company's expenses, including all its general expenses, Congress deemed it necessary to make provision as to the maximum deduction allowable against the investment income so as to prevent the apportionment and the inclusion of the general expenses in this deduction. *Id.*

XLIV. Such apportionments and allocations involve approximations, estimates, or guesses which were a feature of administration which, it appears, Congress desired by the *proviso* to avoid.

XLV. To allocate and say absolutely just what investment expenses have been precludes the idea (in view of the language of the *proviso*) of a division of general expenses and the assignment or inclusion of a portion thereof as an "investment expense." *Id.*

XLVI. It is held that reserves set aside for health and accident insurance contracts are not properly to be included for the purpose of deduction from income for tax purposes, in the "reserve funds required by law" to be held by a life insurance company, under Section 203 (a) (2), Revenue Act of 1928. *Id.*

XLVII. When an insurance company has been classified as a life insurance company in accordance with Section 201 (a), the reserves to be included under Section 203 in determining the 4 per centum deduction are those reserves which are held by such company on account of its life insurance and annuity contracts; this excludes reserves for such casualty insurance as a life insurance company may write. *Id.*

TAXES—Continued.

XLVIII. Life insurance reserves are, in effect, and always in the end, the property of the policyholder. *Id.*

XLIX. In the case of a company which writes life and also casualty insurance, Congress intended the reserve deductions to conform to the special plan for taxation of life insurance companies; the inclusion of reserves maintained out of premiums which belonged, when paid, to the company would not comport with the statutory plan. *Id.*

L. In policies which combine life, health, and accident insurance, the health and accident portions are entirely separate contracts. *Id.*

LI. If a life insurance company writing combined policies were permitted to take a deduction in respect of the health and accident reserves, this allowance would result in a deduction to a life insurance company for casualty reserves which even a casualty company is not permitted to take for this class of insurance under the taxing provisions relating to such companies. *Id.*

LII. "Reserve funds required by law" within the meaning of the taxing acts are those technical insurance reserves which are peculiar to the character of insurance companies claiming the deduction. *Id.*

LIII. The basis upon which casualty insurance companies are taxable is quite different from that of life insurance companies, and no deduction whatever is allowed on account of the mean of the reserve funds but instead a deduction is allowed for claims accrued or losses incurred. *Id.*

LIV. Although departmental regulations and practice will, in a proper case, be given great weight, they cannot abridge the law and they can only stand if they correctly interpret the statute. *Id.*

LV. Deductions from gross income are matters of grace; only those items which clearly come within the class to which the particular statutory provision relates may be allowed; the rule that statutes levying taxes may not be extended by implication beyond the clear import of the language used nor their operations enlarged so as to embrace matters not specifically pointed out applies with equal or greater force to the determination and allowance of deduction. *Id.*

LVI. Where a corporation loaned monies in the District of Columbia at the legal rate of interest and in addition to such interest charged the borrowers a so-called discount, it is held that such discount, even if illegal, is taxable income. *Wardman*, 468.

TAXES—Continued.

LVII. Usury laws are enacted for the benefit of the borrowers rather than the lenders. *Id.*

LVIII. That which is income within the meaning of the Sixteenth Amendment and the statutes enacted pursuant thereto is taxable notwithstanding it may have accrued or been received in connection with an illegal transaction. *Id.*

LIX. The taxability of income is not affected by the fact that the taxpayer employed the accrual method of accounting rather than the cash receipts and disbursements method; the taxation of income on the accrual basis is consistent with the provisions of the Sixteenth Amendment and is specifically recognized and provided for in the taxing statutes. *Id.*

LX. Where under the executed will of her deceased husband, the widow was to receive annually during her life a stated amount, for which purpose the executors were directed to set apart assets of the estate sufficient to pay said amount from the income thereof, and where, after the death of testator, his heirs entered into and executed an agreement that the provisions of a later, unexecuted will should be carried out after the executed will had been probated, and by this agreement a larger amount was paid to the widow annually, partly from the income from the assets set aside as a trust fund for that purpose, and partly from the corpus of the fund, it is held that the widow was not a mere beneficiary of a trust created for her benefit but was, under the requirement of the will that a certain sum be paid to her annually as an annuity, a legatee and that the exemption of her annuity from taxation was not altered by the agreement executed by the heirs. *Walker*, **486.**

LXI. Where annual payments are made by the fiduciary of a trust under a will and such payments do not depend upon income from the trust estate but are payable without regard to the income received by the fiduciary, they are made in discharge of a gift or legacy and are not taxable. *Id.*

LXII. Under the decision in *Lyeth* v. *Hoey*, 305 U. S. 188, a settlement of an estate which provided for the probating of a will does not do away with statutory exemptions; what the plaintiff in that case received by virtue of the agreement over and above what he would have got under the will, he received because of his standing as an heir and his claim in that capacity. *Id.*

TAXES—Continued.

LXIII. In the instant case, under the rules laid down in the *Lyeth case, supra*, the fact that the annual payments made to the wife of the testator under the agreement were more than she would have received under the executed will would not prevent the payments made from being exempt if she was an heir, as in fact she was; whatever additional amount she received under the agreement was merely a gift and consequently not taxable. *Id.*

LXIV. In the instant case, there being no obligation on the part of the widow to pay the tax, her recovery would inure to her benefit alone without affecting the interests of the other heirs of her husband. *Stone* v. *White*, 301 U. S. 532, distinguished. *Id.*

LXV. In arriving at the determination of the values of leaseholds, for estate tax purposes, the date of the death of the decedent is to be taken as the date of valuation. *Meader*, 502.

LXVI. The value of a leasehold, even if it has only a short period to run, may be increased by an option to renew. *Id.*

LXVII. Where on November 1, 1932, taxpayer filed claim for refund, in connection with tax paid for 1929, which claim was specific in character, relating to whether certain interest was tax exempt, and a second claim, seeking refund on other and additional grounds, was filed more than two years after the payment of the 1929 tax, it is held that the second claim cannot be considered an amendment under the rule laid down in the case of *Mabel S. Andrews* v. *The United States*, 302 U. S. 517. *Mohawk Mining*, 548.

LXVIII. A claim which is specific in character cannot be amended, after the statute of limitations has run, to allow recovery on grounds not advanced in the original claim. *Id.*

LXIX. All the revenue acts since the adoption of the Sixteenth Amendment have provided for the return of income on an annual basis, and the return for each year is required to be complete in and of itself. *Id.*

LXX. The same rule applies to limitations applicable to the annual return with respect to the making of additional assessments or the refund of overpayments. *Id.*

LXXI. The fact that adjustments asked for might affect income in subsequent years would not permit a refund for any year other than the year named in the claim for refund. *Id.*

TAXES—Continued.

LXXII. Where plaintiff held stock in the Neidich company of New Jersey, for which he received in 1929 shares of stock of the Underwood-Elliott-Fisher Company, in accordance with the provisions of a contract, January 3, 1929, under which all of the assets of the Neidich corporation were acquired by a new Delaware corporation, caused to be formed for that purpose by the Underwood company, which became the sole owner of all the stock of the new Delaware corporation, it is held that the Underwood company was not "a party to a reorganization" within the meaning of Section 112 (g) of the Revenue Act of 1928. *Davis*, 579.

LXXIII. Book entries tending to show a transfer from the New Jersey corporation to the Underwood company and then from the Underwood company to the Delaware corporation are, in view of the facts as to what actually occurred, held to be of no controlling importance. *Groman* v. *Commissioner of Internal Revenue*, 302 U. S. 82, and *Helvering* v. *Bashford*, 302 U. S. 454, cited. *Helvering* v. *Minnesota Tea Company*, 296 U. S. 387, distinguished. *Id.*

LXXIV. Where payment by taxpayer was entirely voluntary and was made after the expiration of the time for filing a claim for refund and at a time when a suit for recovery of any portion of the estate taxes theretofore paid would have been barred, and also at a time when assessment of additional estate taxes would have been barred, it is held that such payment cannot extend the period within which a claim for refund may be filed. *McCallum*, 606.

LXXV. Statute of limitations cannot be nullified and a new period of limitations created by the voluntary act of the taxpayer. *Id.*

LXXVI. Action of Commissioner in issuing a certificate of overassessment and refunding the voluntary payment, without going into the merits of the case or making any determination as to tax liability is held to be immaterial, the Commissioner having no power to waive the statute of limitations. *Id.*

TRIBAL AFFAIRS.

See Indian Claims V, IX, X, XI.

TRIBAL FUNDS.

See Indian Claims II, III, IV, V, VI, VII, VIII, IX, X, XI.

TREATIES.

See Indian Claims XIII, XIV, XV.

UNITED STATES COMMISSIONER.
It is held that the act of 1928, amending 28 U. S. C. 598, impliedly repealed the clause in 28 U. S. C. 597, requiring a Court Commissioner to secure Court approval of additional per diems, and the regulations of the Attorney General, so far as they exact approval of the Court of per diems involved in the instant case, contravene the amendatory act of May 29, 1928, and an exaction of this nature is void and no effect, as held in *Moreno* v. *United States*, 77 C. Cls. 780. *Moreno*, 268.
USURY.
See Taxes LVII, LVIII.
VALIDITY.
See Patents I.









